(11)

No. 83-728-CFX
Status: GRANTED

Title: Herb's Welding, Inc., et al., Petitioners
v.
Robert H. Gray, Jr., et al.

Docketed:
October 14, 1983

Court: United States Court of Appeals
for the Fifth Circuit

Counsel for petitioner: Simor, John F., Brown III, Wooc

Counsel for respondent: Henderson, T. Gerald, Solicitor General

Entry	Date	Note	Proceedings and Orders
1	Oct 14 1983	G	Petition for writ of certiorari filed.
2	Nov 14 1983		Brief amicus curiae of Kerr-McGee Corporation filed.
4	Dec 7 1983		Order extending time to file response to petitior until January 13, 1984.
5	Jan 5 1984		Brief of respondent Dept. of Labor in opposition filed.
6	Jan 18 1984		DISTRIBUTED. February 17, 1984
7	Jan 18 1984	X	Reply brief of petitioners Herb's Welding, Inc., et al filed.
9	Feb 21 1984		REDISTRIBUTED. February 24, 1984
11	Feb 27 1984		REDISTRIBUTED. March 2, 1984
13	Mar 9 1984		REDISTRIBUTED. March 16, 1984
14	Mar 19 1984		Petition GRANTED.
			**********
15	May 2 1984		Brief of petitioners Herb's Welding, Inc., et al filed.
16	May 2 1984		Joint appendix filed.
17	May 4 1984		Brief amicus curiae of Kerr-McGee Corporation filed.
18	May 7 1984		Brief amicus curiae of Texaco, Inc., et al. filed.
20	Jun 1 1984		Order extending time to file brief of respondent on the merits until July 3, 1984.
21	Jun 9 1984		Brief of respondent Robert H. Gray filed.
22	Jun 11 1984	G	Motion of the Solicitor General for civiced argument filed.
23	Jun 25 1984		Motion of the Solicitor General for civiced argument GRANTED.
24	Jul 3 1984		Brief of respondent Dept. of Labor filed.
25	Aug 8 1984		CIRCULATED.
26	Aug 10 1984		SET FOR ARGUMENT. Wednesday, October 3, 1984. (2nd case)
27	Aug 25 1984		Record filed.
28	Oct 3 1984		ARGUED.

83-728

NO.

Office - Supreme Court, U.S.
FILED
OCT 14 1983
ALEXANDER L. STEVAS
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1983

HERB'S WELDING, INC. and
UNITED STATES FIDELITY & GUARANTY CO.

Petitioner

VERSUS

ROBERT H. GRAY

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

WOOD BROWN III
MONTGOMERY, BARNETT,
BROWN & READ
1800 FIRST NATIONAL BANK
OF COMMERCE BUILDING
NEW ORLEANS, LOUISIANA 70112
TELEPHONE (504) 561-8989

ATTORNEYS FOR PETITIONER

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

QUESTIONS PRESENTED

(1) Whether a welder working on a fixed platform in Louisiana territorial waters is covered under the Longshoremen & Harbor Workers Compensation Act (33 U.S.C. §§901, et seq., particularly §§902(3) and 903.)

(2) Whether workmen engaged in support activities (such as welding) in connection with mineral extractive activities are engaged in "maritime employment" (33 U.S.C. §902[3]).

(3) Whether workmen on fixed platforms in Louisiana territorial waters are working in a covered situs as required by 33 U.S.C. §903.

(4) Whether oil field labor, such as welding, is "maritime employment" as that term is contemplated in the Longshoremen & Harbor Workers Compensation Act, 33 U.S.C. §902[3].

PARTIES TO THE PROCEEDING

The parties to the proceeding are listed below:

Robert H. Gray
Herb's Welding, Inc.
United States Fidelity & Guaranty Co.
Director, Office of Workmens Compensation Programs, United States Department of Labor.

Pursuant to Rule 28.1 of the Rules of this Court, undersigned counsel certifies to the Court that, after diligent investigation, he is advised that the United States Fidelity & Guaranty Co. has no parent, companies, affiliates or subsidiaries as those terms are used in said rule. Undersigned counsel further certifies that Herb's Welding, Inc. is no longer in existence, however, based on personal knowledge, it had no parent companies, affiliates or subsidiaries, either, when it was in operation.

Wood Brown III

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i
PARTIES TO THE PROCEEDINGS ii
TABLE OF CONTENTS iii
TABLE OF AUTHORITIES iv
OPINIONS BELOW 1
JURISDICTION 2
STATUTE INVOLVED 2
STATEMENT OF THE CASE 3
JURISDICTION IN THE COURT OF THE FIRST INSTANCE 4
REASONS FOR GRANTING THE WRIT 5
CONCLUSION 19
CERTIFICATE OF SERVICE 20
APPENDIX A—Opinion of the Court of Appeals ... A-1
APPENDIX B—Memorandum decision of denial of application for rehearing and suggestion of rehearing en banc A-10
APPENDIX C—Original Decision and Order of the Administrative Law Judge A-14
APPENDIX D—Initial Decision of the Benefits Review Board A-19
APPENDIX E—Dismissal order from the Court of Appeals A-38
APPENDIX F—Decision and Order on Remand by the Administrative Law Judge A-39
APPENDIX G—Decision and Order of the Benefits Review Board A-46

TABLE OF AUTHORITIES

Cases: **Page**

Barnes v. Sun Oil Co.,
362 So.2d 761 (La. 1978) 14

Bible v. Chevron Oil Co.,
460 F.2d 1218 (5th Cir. 1972) 13

Boudreaux v. American Workover, Inc.,
664 F.2d 463 (5th Cir. 1981); Rehearing Granted 664 F.2d 480 (5th Cir. 1982); Opinion on Rehearing 680 F.2d 1034 (5th Cir. 1982) 6, 7, 10, 11

Broussard v. Heebe's Bakery, Inc.,
263 La. 561, 268 So.2d 656 (1968) 14

Chevron Oil Co. v. Huson,
404 U.S. 97, 92 S.Ct. 349 (1971) 5, 7, 9, 10, 12

Director, Office of Workmens Compensation Programs v. Perini North River Associates,
__ U.S. __, 103 S.Ct. 634 (1983) 11

Dore v. Link Belt, Inc.,
391 F.2d 671 (5th Cir. 1968) 7

Gray v. Chevron Oil Co.,
631 F.2d 1263 (5th Cir. 1980); 644 F.2d 540 (5th Cir. 1981) 13

Herb's Welding, Inc. v. Gray,
703 F.2d 176 (5th Cir. 1983); Application and Suggestion for Rehearing denied, 711 U.S. 666 (5th Cir. 1983) 1

North East Marine Terminals, Inc. v. Caputo,
432 U.S. 249, 97 S.Ct. 2348 (1977) 5

P. C. Pfeiffer Co., Inc. v. Ford,
444 U.S. 69, 100 S.Ct. 328 (1980) 15, 16

Pippin v. Shell Oil Co.,
661 F.2d 378 (5th Cir. 1981) 6, 7, 10, 11

Rodrigue v. Aetna Cas. & Sur. Co.,
395 U.S. 352, 89 S.Ct. 1835 (1969) 5, 6, 7, 8, 9, 10, 12, 13, 16, 17

Rodrigue v. Aetna Cas. & Sur. Co.,
395 F.2d 216 (5th Cir. 1968) 7

Sun Ship, Inc. v. Pennsylvania,
447 U.S. 715, 100 S.Ct. 2432 (1981) 14

Thornton v. Brown & Root, Inc.,
707 F.2d 149 (5th Cir. 1983) 7, 9

Victory Carriers v. Law,
404 U.S. 202, 92 S.Ct. 418 (1971) 6, 17

STATUTES

28 U.S.C. §1254(1) 2

33 U.S.C. §902(3) 2

33 U.S.C. §903 . . . . . 2, 3

33 U.S.C. §919, 921(b), 921(c) 4, 17

43 U.S.C. §1333 . . . . . 5, 15

La. R.S. 23:1032 14

OTHER AUTHORITIES

U.S. Code Congressional & Administrative News, 1972 p. 4708 15

Senate Report 92-1125 p. 13 (1972) 15

House Report 92-1441 p. 10-11 (1972) 15

Hearings before the U.S. Senate Committee on Labor & Public Welfare on S2318, 525 and 1547 14

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

HERB'S WELDING, INC. and UNITED STATES FIDELITY & GUARANTY CO.

Petitioners

versus

ROBERT H. GRAY

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Herb's Welding Inc. and United States Fidelity & Guaranty Co. petition this Court for a Writ of Certiorari to review the judgment and decree of the United States Court of Appeals for the Fifth Circuit in this case. Petitioners were appellants in that Court in the final analysis and were respondents in the administrative determinative processes before the U.S. Department of Labor (Benefits Review Board and Office of Administrative Law Judges).

OPINIONS BELOW

The opinion of the Court of Appeals (Ap. A, *infra*, A-1) is reported at 703 F.2d 176 (5th Cir. 1983). Petitioners

applied for a rehearing and suggested that the matter be heard by the Court of Appeals en banc. This application and suggestion were denied by the Court on August 8, 1983. The denial is reported at 711 F.2d 666 (5th Cir. 1983) and is appended hereto as Appendix B.

Other opinions below are appended as well. The original "Decision and Order" of the Administrative Law Judge is appended as Appendix C. The initial decision of the Benefits Review Board is appended hereto as Appendix D. An appeal was taken to the Fifth Circuit Court of Appeals which was dismissed by order as being premature. The dismissal is appended hereto as Appendix E. The "Decision and Order on Remand" of the Administrative Law Judge is appended hereto as Appendix F. The "Decision and Order" of the Benefits Review Board on appeal from that decision is attached as Appendix G.

JURISDICTION

The opinion of the Court of Appeals in this case was handed down on April 18, 1983. The application for rehearing was timely filed, together with a separate suggestion that the matter should be reheard en banc. The application and suggestion were denied by the appellate Court on August 8, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTE INVOLVED

Sections 2(3) and 2(4) of the Longshoremen & Harbor Workers Compensation Act (33 U.S.C. §§902(3) and 902(4)) provides in pertinent part:

(3) The term "employee" means any person

engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and shipbreaker ...

(4) The term "employer" means an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel).

Section 3(a) of the Longshoremen & Harbor Workers Compensation Act (33 U.S.C. §903(a)) provides in pertinent part:

Sec. 3.(a) Composition [sic] shall be payable under this Act in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel ...

STATEMENT OF THE CASE

The facts applicable to this case are stated by the organ of the Court of Appeals (703 F.2d at 177):

"Gray, a welder with Herb's Welding, was assigned to the Bay Marchand oil and gas field which is located both in Louisiana territorial waters and over the Outer Continental Shelf.

There Gray helped repair and maintain oil and gas lines and fixed platform production structures.

When he was on duty, Gray lived, ate and slept on a structure situated in Louisiana waters, and he worked on platforms located in both Louisiana and Outer Continental Shelf waters. He was transported to his daily work sites by boat or helicopter. On July 11, 1975, Gray was welding a two-inch gas line on a platform in the navigable waters of Louisiana when an explosion occurred. Gray, in trying to run from the area, twisted his knee.

The insurance company paid Gray temporary total disability, permanent partial disability and related medical expenses under Louisiana worker's compensation. ..."

JURISDICTION IN THE FIRST INSTANCE

The underlying issue in this case is whether there is jurisdiction under the Longshoremen & Harbor Workers Compensation Act in the first instance. The claimant invoked the jurisdiction of the Office of the Administrative Law Judges of the United States Department of Labor under Section 19 of the Longshoremen & Harbor Workers Compensation Act Extension of 1972 (33 U.S.C. §919(d)). The jurisdiction of the Benefits Review Board, if any, is vested by Section 21(b) of the LHWCA (33 U.S.C. §921(b)). The Jurisdiction of the Court of Appeals is vested by the operation of Section 21(c) of the LHWCA (33 U.S.C. §921(c)).

REASONS FOR GRANTING THE WRIT

(1) The Court of Appeals has decided an important point of federal law inconsistently with prior decisions of this Court. The decision was that oil field production work is maritime employment and this decision is inconsistent with this Court's decisions in *Rodrigue v. Aetna Cas. & Sur. Co.*, 395 U.S. 352, 89 S.Ct. 1835 (1969) and *Chevron Oil Co. v. Huson*, 404 U.S. 97, 92 S.Ct. 349 (1971).

(2) The decision of the Court of Appeals has decided an important point of federal law which has not been decided by this Court previously and which should be settled by this Court.

This point is whether any part of a stationary platform located in Louisiana territorial waters[1] is a covered "situs"[2] under the LHWCA where that portion of the platform is not being used for loading and unloading of vessels or engaged in other statutorily defined "maritime employment activities". The Court of Appeals decided that a covered "situs" existed and this point should be decided by this Court.

(1) PREAMBLE TO ARGUMENT ON REASONS

The suggestions of reasons for granting the writ are not distinct and there are points which must be made on

---

[1] Thus, by its very terms, the Outer Continental Shelf Lands Act (43 U.S.C. §1331, et seq.) does not apply to the juridical transaction which forms the basis of this litigation. The platform, by definition lies within Louisiana's territorial waters, not on the Outer Continental Shelf.

[2] See the analysis in *Northeast Marine Terminals, Inc. v. Caputo*, 432 U.S. 249, 97 S.Ct. 2348 (1977)

each which are similar. In considering this application, it is first necessary to look at the rationale of the opinion below. The Court there properly states the threshhold issue: whether the LHWCA can reach an oil field worker injured on a fixed platform located in Louisiana territorial waters. Reference was immediately made to this Court's decision in *Rodrigue, supra.* It is stated that this Court "likened" these offshore platforms to wharves located over navigable waters. It is then stated that wharves and piers were not covered by the LHWCA prior to 1972 (and therefore were not covered at the time of the decision in *Rodrigue*).[3] However, since the LHWCA amendments in 1972 extended coverage to wharves and piers, this in effect overruled that portion of *Rodrigue* and constituted oil field platforms as covered siti.[4]

In making this determination the Court of Appeals stated that these platforms "are essential to and customarily used in the loading and unloading of crews, supplies and oil." The Court used this factor to buttress the conclusion that the fixed platform is a covered situs.

The opinion than proceeds to discuss status and, premised on the same Court's previous decisions in *Pippen v. Shell Oil Co.*, 661 F.2d 378 (5th Cir. 1981) and *Boudreaux v. American Workover, Inc.*, 664 F.2d 463 (5th Cir. 1981),

[3] See *Victory Carriers v. Law*, 404 U.S. 202, 92 S.Ct. 418 (1971)

[4] Here, again, the dichotomy between platforms on the Outer Continental Shelf and those in state waters should be kept in mind. Accidents and injuries which occur more than three miles offshore are covered by the LHWCA because of the operation of the Outer Continental Shelf Lands Act (OCSLA). *Rodrigue* did not deal with this point because (1) it was not before the Court, it could not be, and because (2) OCSLA mandated coverage by the LHWCA. The point here is that *Rodrigue* is irrelevant in a determination of "situs". The situs there was present as a matter of law. More on this later.

680 F.2d 1034 (5th Cir. 1982), Cert. denied, __ U.S. __ 103 S.Ct. 815 (1983). The Court held that, as a matter of law, oil field labor is "maritime employment" as that term is defined in the LHWCA.[5] On the basis of this, the determination is made that Gray was covered satisfying both the situs and status tests mandated by this Court's earlier decisions.

Thus, what we have is the use of this Court's landmark decision in *Rodrigue* to justify a finding of "situs", something that was not at issue there and something that decision does not stand for at all. And, in the very next section of the opinion, the Court turns its back on *Rodrigue* and decides that oil field work is maritime in nature, something totally inconsistent with the letter and spirit of the *Rodrigue* decision.

This leads to the two reasons we advance for the favorable consideration by the Court of this application. First, the decision by the Court of Appeal that there is "status" in this case is contrary to the spirit of *Rodrigue*, therefore is contrary to prior decisions by this Court. Second, the decision by the Court of Appeals that inshore platforms are covered "siti" is not mandated by *Rodrigue* (as the Court of Appeals holds) but is something new, something that has not been held before and is something which, if it is the law, this Court should decide it. Put another way, there is nothing in the LHWCA or the amendments of 1972 which extends the coverage of this federal statute to these structures. If the act is to be construed that such an intention existed, this Court should make that construction.

[5] The same Court has more recently taken this "principle of law" as being established in "this circuit", citing its own decisions in *Pippen, Boudreaux*, and in the instant case. See *Thornton v. Brown & Root, Inc.*, 707 So.2d 149 (5th Cir. 1983).

(2) ARGUMENT ON POINT 1

The Decision Below is Contrary to Prior Decisions By This Court.

As mentioned above, a finding of coverage under the LHWCA requires a dual determination that there is a covered "situs" and a covered "status". In its determination of "status" the Court below makes a determination that oil field labor is "maritime employment". This determination is directly contrary to this Courts decision in the *Rodrigue* decision.

The issue in *Rodrigue* was whether plaintiffs in wrongful death actions could avail themselves of Louisiana law as regards recovery, or whether they were limited to the less generous provisions of the Death on the High Seas Act. This Court, reversing the Fifth Circuit held that offshore platforms were islands, that they were treated like federal enclaves in state territory, that federal law applied except where there was an hiatus therein, in which cases Louisiana law applied. On the face of it, it does not seem that that decision has anything to do with the dispute before the Court in the captioned case.

However, a review of the case, especially in the light of the appellate decisions[6] and in the light of a subsequent decision explaining and limiting the result,[7] it is apparent that, *prior* to this Court's decision in *Rodrigue*, oil field workers were held to be maritime workers, essentially because the work they performed was performed in a

[6] *Dore v. Link Belt, Inc.*, 391 F.2d 671 (5th Cir. 1968); *Rodrigue v. Aetna Cas. & Sur. Co.*, 395 F.2d 216 (5th Cir. 1968).

[7] *Chevron Oil Co. v. Huson*, 404 U.S. 97, 92 S.Ct. 349 (1971).

location surrounded by water and because the work they did was essential to the commerce of the area, which, being on the water, was "maritime". Indeed, this is the rationale of the two appellate decisions which were reviewed and reversed in the decision by this Court in *Rodrigue*.

Those cases, applying then settled jurisprudence, make the admiralty law applicable and take the expected next step to oust state law because of the uniformity of the admiralty principle. This Court's opinion in *Rodrigue* is a complete treatise on why admiralty law does not apply. The legislative history is traced, leading to the conclusion that Congress did not intend that admiralty law apply to persons working on platforms on the outer continental shelf. This history is only tangentially important here because this platform on the facts, was not on the outer continental shelf. What is important in the *Rodrigue* decision is the rationale which supports the conclusion that these workmen are, essentially, landbased workers doing land based type work.

The *Huson* decision, which came down two years later makes it abundantly clear what the Court was doing in *Rodrigue*, that is, abandoning admiralty law in favor of state law as to disputes arising on fixed platforms. This decision involved the application of Louisiana prescription (statute of limitations) which would have barred plaintiff's claim. The precise holding is that the plaintiff in that case would not be barred because of his reliance on the "pre-Rodrigue application of admiralty law". However, the result makes it clear that prior to *Rodrigue*, admiralty law applied to these cases.

The point here is that *Rodrigue* and *Huson* stand for the proposition that offshore oil field workmen are not

"maritime workers". If it were any other way, perhaps it could be said that there would be a resort to Louisiana wrongful death relief (barring application of the uniformity principle) but there is no way it would be said that Louisiana prescription applies. If these men were maritime workers, then the maritime doctrine of laches would necessarily apply. Put another way, if the Court of Appeals in this case is right, then Mr. Huson did not need to come here, prescription was no problem to him and Mrs. Dore and Mrs. Rodrigue would have gotten only pecuniary losses rather than the more generous recovery permitted under Louisiana law. But that didn't happen, and the reason it didn't was, in part, due to the fact that Mess'rs Dore, Rodrigue and Hudson were *not* maritime workers.

Admittedly, *Rodrigue* and *Huson* involve cases which arose on platforms on the outer continental shelf. However, there is no demonstrable or demonstrated difference between the work described in those opinions or of work on the outer continental shelf in general and the work described in the case at bar. Indeed, the statement of facts in this case is that Gray worked sometimes on the outer continental shelf and sometimes on the state water platforms. Any distinction that *Rodrigue* and *Huson* are somehow different because they arose offshore and Gray arose inshore would be a distinction without a difference.

The genesis of the notion that oil field labor is somehow "maritime" in nature comes originally from the Fifth Circuit's opinion in *Pippen v. Shell Oil Co., supra.* It was carried forward by the same Court in *Boudreaux v. American Workover, Inc., supra.* A writ application was forwarded to this Court in *Pippen,* but was late filed and was therefore rejected by the Clerk. The writ application in *Boudreaux* was filed and was later denied by the Court on

the basis of the then recent decision of this Court in *Director v. Perini North River Associates,* __ U.S. __, 103 S.Ct. 634 (1983).[8]

There is nothing in *Pippen,* or *Boudreaux,* or this case, or the more recent decision of the Fifth Circuit in *Thornton v. Brown & Root,*[9] which justifies factually the conclusion that production of minerals from the seabed is "maritime commerce" or that the work being performed by those so engaged is maritime employment. If some factual showing had been made below and if this factual showing were stated into the opinions as justifying a change in this

[8] The decision in *Director v. Perini* was on the basis of a finding that Mr. Churchill, the claimant there, would have been covered by the LHWCA prior to the passage of the 1972 amendments, and, since there was no evident intention on the part of Congress to restrict coverage, Churchill would necessarily be covered thereafter. On this basis, the decision of the Second Circuit denying benefits was reversed.

This result controlled the *Boudreaux* decision since Mr. Boudreaux had been hurt on a barge and he would have been covered by the LHWCA before 1972. No reasons were assigned for the denial of the writ but it is assumed that this was the reason for the denial. The question ancillary to that in *Boudreaux*, which adopted the reasoning in *Pippen* concerning the "maritimeness" of oil field work was not addressed by this Court.

The result in *Director v. Perini* does not control this decision because the accident to Mr. Gray did not occur on a vessel, but on a platform. There is no "instant situs" in this case.

[9] 707 F.2d 149 (5th Cir. 1983). *Thornton* holds that workers on land constructing offshore platforms are covered by the LHWCA their work is on the platforms which are used in the "maritime commerce" of producing oil from the seabed. This is the "next step" from the unsupported conclusion of *Pippen,* perpetuated in *Boudreaux* and in the opinion which is the subject of this application.

To the extent that this conclusion is one of law, we suggest that it, as well, is a matter which has not been passed on by this Court and that it is something that this Court should pass on, and we will treat of this in the next section as well.

Court's conclusion in *Rodrigue,* then, perhaps there would be some justification for the differing result. However, as mentioned, there is no such factual justification either made or stated. Without such justification, we suggest that this Court's decisions in *Rodrigue* and *Huson* control. There is nothing maritime about the work which Robert Gray was doing at the time of his injury.

There is no automatic status finding because someone was involved in the production of minerals from the seabed of Louisiana waters. The holding to the contrary by the appellate court below is contrary to the prior decisions of this Court and should not be permitted to stand.

(3) ARGUMENT ON POINT 2

The Decision Below is on an Important Point of Federal Law which Should be Decided by This Court.

The federal point here is whether fixed platforms in state territorial waters are "siti" or locations as contemplated by the LHWCA such that maritime workers injured thereon are covered by the act. This Court has not passed on that point.

To start with, as conceded in the appellate opinion below, *Rodrigue* requires that this platform be treated as an island (703 F.2d at 179). There is nothing in the facts which would bring this platform or the location where the accident happened within the statutory definition of a covered situs. The statute says that accidents and injuries are covered where they occur "upon the navigable waters of the United States including any adjoining pier, wharf, dry-dock, terminal, building way, marine railway or other

adjoining area customarily used by an employer in loading, unloading, repairing or building a vessel."[10] The facts of this case do not on their face bring the area where the accident occurred within that definition, especially in view of the *Rodrigue* opinion which makes this an island.

The reasoning of the Court of Appeals is that, since this Court "likened" platforms to wharves in the *Rodrigue* decision and since Wharves were not covered in 1969 but are not, as a result of the 1972 amendments to the LHWCA, therefore platforms are wharves and constitute covered "siti" at this time.

Two analyses have to be made of this reasoning. First, can it be said in the passage of the LHWCA extension in 1972 that Congress intended to extend coverage to all oil field workers on inshore platforms? Secondly, is the analogy to the language of the *Rodrigue* decision appropriate in this case?

(a) *Congress' Intention*

It is, of course, undeniable that there is nothing in the 1972 extention of the LHWCA concerning oil field workers. More to the point, there appears to be nothing that evidences an intention to extend coverage of the act to workmen on platforms in state waters who were never covered before. See *Bible v. Chevron Oil Co.*, 460 F.2d 1218 (5th Cir. 1972); *Gray v. Chevron Oil Co.*, 631 F.2d 1263 (5th Cir. 1980), 644 F.2d 540 (5th Cir. 1981).[11]

---

[10] 33 U.S.C. §903(a).

[11] *Gray v. Chevron*, referred to above, involves the same Robert H. Gray who is respondent here, and reaches a directly contrary to the result here, at least on its face. Gray filed a suit in tort against Chevron

It is true that another bill was considered in the U.S. Senate at approximately the same as the 1972 extension of the LHWCA which would have extended the LHWCA to all oil field workers, whether or not they were "seaman".[12] This writer does not find anything in the materials concerning that bill which would have indicated an intent to extend LHWCA coverage to platform workers in state waters (or, to the contrary to exclude them from coverage). However, the bill was broad enough arguably to extend coverage to everyone engaged in "maritime extractive operations." The important point in mentioning this bill is that the bill did not pass!!

(Footnote 11 continued)
for his injuries. Chevron interposed a "statutory employer" defense permitted in Louisiana. Louisiana extends the tort immunity of the employer to the general contractor or "principal" as well. See *Broussard v. Heebe's Bakery, Inc.*, 263 La. 561, 268 So.2d 656 (1968); *Barnes v. Sun Oil Co.*, 362 So.2d 761 (La. 1978). This principle was subsequently codified into positive law, La. Act 147 of 1976, La. R.S. 23:1032.

The point of this is that Chevron successfully interposed the Louisiana defensive doctrine and this was affirmed by the Fifth Circuit on the basis that this was a Louisiana state case, having occurred on an inshore platform, and that the LHWCA did not apply. In this case which is the subject of this appeal, the Court reversed itself, without mentioning its prior decision, holding that the LHWCA did apply. The anomaly is treated by the Court in its per curiam in the denial of the application for rehearing and the suggestion of rehearing en banc.

While the rationales of the two decisions are clearly inconsistent, the results are not necessarily so. It is legally possible for two compensation schemes to operate in the same geographical area, *Sun Ship Inc. v. Pennsylvania*, 447 U.S. 715, 100 S.Ct. 2432 (1981). There is nothing abhorrent in permitting a claim under one act and applying the defensive provisions of both acts to compensation claimant's suit in tort. Louisiana has a "statutory employer" defense and the LHWCA prohibits suits against co-employees.

[12] This was the so-called "Tower Bill" Senate Bill 1547, 92nd Congress. The hearings on this bill and the LHWCA extension were held at the same time. Hearings Before the Senate Subcommittee on Labor, Senate Committee on Labor & Public Welfare on S2318, S525 and S.1547, 92d Congress, Second Session.

It is possible to infer, from some of the discussion reported[13] that Congress intended to maintain coverage for those workers covered at the time of the discussion in the then pending extension of the LHWCA. (Which is the sense of the *Perini* case, *supra*.) However, the fact of the non-passage of this bill, given its subject matter (coverage of all workers engaged in "marine extractive operations") coupled with the failure to include oil field workers *at all* in the extension of the LHWCA[14] leads inexorably to the conclusion that workers in the same category as Mr. Gray were not intended to be included in the extension.

They are not mentioned, expressly or by implication. Second, a bill which likely would have included them was not passed by the Congress. The combination of these factors indicates that Congress did not intend that the extension act of 1972 to include these workers.

Finally, on this point, a welder on a production platform in state territorial waters is no more engaged in "maritime employment" than would be the employee hired to handle stored cargo in connection with transshipment or the clerical employees mentioned by Congress (S. Rep. 92-1125, p. 13 (1972); H. Rep. 92-1441, p. 10-11; U.S. Code Cong. & Adm. News, 1972, p. 4708, et seq.), and mentioned by this Court in *P. C. Pfeiffer Co., Inc. v. Ford*, 444 U.S. 69 at 79-80, 100 S.Ct. 328 at 335-36 (1979). Moreover, if this platform in inshore waters is to be treated as a covered

---

[13] Id. at 256, 487, 574, 577.

[14] In considering this, the Court should not be misled by the fact that oil field workers on the outer continental shelf are covered by the LHWCA because of the specific terms of the Outer Continental Shelf Lands Act, 43 U.S.C. §1333 (as it existed at the time this accident occurred in 1975). This is so, obviously, because Congress mandated that it be so, something that cannot be said of workers on Louisiana state water platforms.

"situs", it must be so treated as an *onshore* situs under *Pfeiffer, supra.* The point here is that there is nothing in Congress' action in the 1972 extension act which evidences an intention to cover Gray, either as a welder or as a maritime extractive worker on a fixed platform on Louisiana territorial waters.

(b) *Analogy to Rodrigue*

This leads to the second point. Boiled down to its essentials, the reasoning of the Court of Appeals on the "situs" question is that (1) this Court in *Rodrigue* "likened" platforms to wharves, (2) wharves were not covered in 1969 when Rodrigue was decided; however, (3) wharves are covered now by virtue of the 1972 extension of the LHWCA, (4) therefore, platforms inshore are covered now.

We respectfully submit that the opinion of this Court at no time "likened" platforms to wharves. The word is used *once* in the *Rodrigue* opinion, then in the context of a discussion of the history of the OCSLA (395 U.S. at 366, 89 S.Ct. at 1842). Even the "likening" defeats the analogy because the remark in which wharves are referred to is a notation that accidents thereon were not covered because Congress, at that time, had not mandated that there be coverage. The point is that the opinion of this Court does not equate wharves and piers on the one hand with offshore platforms on the other. The sense on the opinion is more one of differentiation than of equating the structures and their purposes.[15]

[15] This "likening" or equating by the Court of Appeals is also unsupported in the record before the Court. There is nothing which indicates that the area of the platform where Gray was injured was used for loading and unloading (704 F.2d at 178) or that the entire platform was so used (704 F.2d at 179). Of course, if this were true, then the area is

We further respectfully submit that the reasoning that this Court used in *Victory Carriers, Inc. v. Law,* 404 U.S. 202, 92 S.Ct. 418 (1971) is applicable here.[16] There, the suggestion was made that there should be coverage to workmen on wharves because they were doing essentially the same work that their co-workers were doing in the holds of the ships only a short distance away. This Court rejected the argument and closed with the following:

> "... Congress might well prefer not to extend the jurisdiction of the federal courts. On the other hand, if denying federal remedies to longshoremen injured on land is intolerable, Congress has ample power under Arts. I and II of the Constitution to enact a suitable solution."

This is no less true in this case. It is apparent from that above that Congress has not seen fit to extend coverage to workers on fixed platforms in state waters. It

(Footnote 15 continued)
a maritime "situs" because of this fact alone. That it is not so in this case is seen by the mental gymnastics indulged by the Court of Appeals in resorting to the misinterpretation of the *Rodrigue* decision to justify its conclusion. Put another way, if there was maritime "situs" as a result of the nature of the activity thereon, why go to the trouble to justify it otherwise on such shaky grounds?

More to the point, a careful reading of the underlying decisions of the Administrative Law Judge and of the Benefits Review Board indicate absolutely no basis for such a conclusion. Under the appellate scheme set up in the LHWCA (33 U.S.C. §921[c]) findings of fact must be made on the trial level. If such a finding were necessary, then, perhaps the matter should have been remanded once more because it simply does not exist otherwise in the record before that Court or the record here.

[16] The incidental parallels in the case are noteworthy. The same Court of Appeals involved here was involved there and the result obtained, extension of the LHWCA into areas not then intended, was the same as here.

is also apparent that Congress had before it a bill which would have had the effect of extending such coverage and that that bill was not passed. The effect of the decision of the Court of Appeals is to accomplish with the stroke of a judicial pen that which Congress declined to do.

CONCLUSION ON REASONS FOR GRANTING THE WRIT

In conclusion on this point, we respectfully suggest that the decision of the Court of Appeals that oil field labor is "maritime in nature" is (1) not supported in the record of this case or of the cases to which reference is made; (2) is directly contrary to and in the face of the major prior decisions of this Court on point, and (3) Constitutes a decision of an important point of federal law which should be decided by this Court. Specifically, Congress declined to grant coverage under the LHWCA to claimants like Mr. Gray by failing to adopt the Tower Bill mentioned above. If coverage is to be extended judicially, it should be this Court which extends it, not the Court of Appeals.

Likewise, the holding that platforms in state waters are covered "siti" is something that Congress failed to enact, given the specific opportunity to do so. If the failure of Congress to pass this bill is to be corrected by the Courts, it should be this Court which makes the correction, not the Court of Appeals.

However, following the logic that this Court has followed previously, we suggest that the extension of coverage to plaintiffs like Mr. Gray is something which should be left to Congress. When the Court of Appeals usurped Congress' function in making such an extension, it erred and this error should be reversed by this Court.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

GOLD, LITTLE, SIMON,
WEEMS & BRUSER
JOHN F. SIMON, ESQ.
P.O. Box 6118
Alexandria, La. 71301

MONTGOMERY, BARNETT,
BROWN & READ

Wood Brown III
1800 First Nat'l Bank of Commerce Bldg.
New Orleans, La. 70112

CERTIFICATE OF SERVICE

Undersigned counsel, a member of the Bar of this Court, certifies that three copies of this petition and all related documentation has been mailed to each opposing counsel as follows:

Joshua S. Gillelan, II, Esq.
Office of the Solicitor of Labor
U. S. Department of Labor
Suite N2620 - NDOL
Washington, D. C. 20210

James J. Brady, Esq.
P. O. Box 1792
Alexandria, La. 71301

T. Gerald Henderson, Esq.
P. O. Box 407
Alexandria, La. 71301

Undersigned counsel makes this certificate for purposes of complying with Rule 28.3 and 28.5 of the Rules of this Court.

Wood Brown III

APPENDIX "A"

HERB'S WELDING and United States Fidelity & Guaranty Company,
Petitioners,

v.

Robert H. GRAY, Jr. and The Director, Office of Workers' Compensation Programs, United States Department of Labor,
Respondents.

No. 82-4147

United States Court of Appeals,
Fifth Circuit

April 18, 1983

Benefits Review Board awarded compensation under the Longshoremen's and Harbor Workers' Compensation Act, and employer appealed. The Court of Appeals, Clark, Chief Judge, held that: (1) the Act as amended in 1972 can reach offshore oil field worker injured upon fixed platform located in Louisiana waters, and (2) worker who did welding and maintenance work on offshore platforms and at time of injury was welding gas lines, his work being necessary for offshore drilling process, which is maritime commerce, was employed in maritime employment and was covered.

Affirmed.

John F. Simon, Alexandria, La., for petitioners.

Joshua T. Gillelan, II, James J. Brady, T. Gerald

Henderson, Alexandria, La., for respondents.

Petition for Review of a Final Order of the Benefits Review Board.

Before CLARK, Chief Judge, THORNBERRY and REAVLEY, Circuit Judges.

CLARK, Chief Judge:

Herb's Welding, a company which provides welding services to oil field rigs, appeals from a Benefits Review Board award of compensation to Robert H. Gray under the Longshoremen's and Harbor Workers' Compensation Act. We affirm.

Gray, a welder with Herb's Welding, was assigned to the Bay Marchand oil and gas field which is located both in Louisiana territorial waters and over the Outer Continental Shelf. There Gray helped repair and maintain oil and gas lines and fixed platform production structures.

When he was on duty, Gray lived, ate and slept on a structure situated in Louisiana waters, and he worked on platforms located in both Louisiana and Outer Continental Shelf waters. He was transported to his daily work sites by boat or helicopter. On July 11, 1975, Gray was welding a two-inch gas line on a platform in the navigable waters of Louisiana when an explosion occurred. Gray, in trying to run from the area, twisted his knee.

The insurance company paid Gray temporary total disability, permanent partial disability and related medical expenses under Louisiana worker's compensation. The carrier refused to pay benefits under the Longshoremen's and

Harbor Workers' Compensation Act (LHWCA). An administrative law judge refused the LHWCA claim finding that Gray was not involved in maritime employment. The Benefits Review Board reversed the denial of benefits on the ground that Gray was covered under the Outer Continental Shelf Lands Act and remanded the case for entry of an award. The administrative law judge awarded $10,000 and deducted the $3,000 already awarded under the state law.

The parties have devoted a considerable amount of their appellate effort to discussing whether the Outer Continental Shelf Lands Act applies to this case. We need not reach this issue since we find that Gray qualifies for coverage under the LHWCA.

At the threshold, we must decide whether the LHWCA can reach an offshore oil field worker injured upon a fixed platform located in Louisiana waters. In *Rodrigue v. Aetna Casualty and Surety Co.*, 395 U.S. 352, 89 S.Ct. 1835, 23 L.Ed.2d 360 (1969), the Supreme Court declared that fixed offshore platforms are artificial islands and therefore outside traditional maritime jurisdiction. *Id.* at 365-66, 89 S.Ct. at 1842. The *Rodrigue* Court determined that the Death on the High Seas Act, 46 U.S.C. § 761, did not apply to wrongful death actions brought by the families of two men who were killed upon fixed platforms on the Outer Continental Shelf off the coast of Louisiana. Justice White wrote that traditional admiralty jurisdiction did not extend to these platforms. He likened them to wharves located above navigable waters. *Id.* at 366, 89 S.Ct. at 1842.

In 1972, three years after *Rodrigue* was written, Congress amended the Longshoremen's and Harbor Workers'

Compensation Act to extend the area of its coverage. Prior to the amendment, the Act required a covered injury to occur "upon navigable waters." 33 U.S.C. § 903(a) (1970). The amendment added coverage for accidents occurring upon "any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel." 33 U.S.C. § 903(a) (1975). At the time *Rodrigue* was written, wharf-like fixed platforms were outside the coverage of the Act. Today, accidents upon wharves over navigable waters are within the statutory jurisdiction of the LHWCA. It would be incongruous, therefore, not to extend LHWCA jurisdiction to the fixed platform in this case. Such platforms are essential to and customarily used in the loading and unloading of crews, supplies and oil. Their function is precisely that of wharves over navigable waters. The jurisprudential concept of an island carries with it the concept of the island's shore and the function of the structure as a wharf projects from that "land."

For the purposes of the LHWCA, it makes no difference that the navigable waters involved are also state territorial waters. *Boudreaux v. American Workover, Inc.*, 680 F.2d 1034, 1035-36 (5th Cir. 1982) (en banc), *cert. denied*, __ U.S. __, 103 S.Ct. 815, 74 L.Ed.2d 1013 (1983). Workers injured on movable drilling barges are covered under the LHWCA whether the vessel on which they work is located in territorial or Outer Continental Shelf waters. *Id.* Workers injured on fixed platforms located upon the Outer Continental Shelf receive LHWCA coverage through the Outer Continental Shelf Lands Act.[1] Workers en route

[1] The Outer Continental Shelf Lands Act provides, in relevant part:

to fixed platforms are granted coverage. *Nalco Chemical Corp. v. Shea*, 419 F.2d 572 (5th Cir. 1969). To bar from the Act's coverage all fixed-platform workers in territorial waters would create a curious hole in LHWCA coverage.[2] We decline to do it.

(Footnote 1 continued)

> With respect to disability or death of an employee resulting from any injury occurring as the result of operations conducted on the Outer Continental Shelf for the purpose of exploring for, developing, removing, or transporting by pipeline the natural resources, or involving rights to the natural resources, of the subsoil and seabed of the Outer Continental Shelf, compensation shall be payable under the provisions of the Longshoremen's and Harbor Workers' Compensation Act.

43 U.S.C. § 1333(b).

[2] This sort of checkered coverage would harken back to the days of "maritime-but-local" exceptions. *Grant-Smith-Porter Ship Co. v. Rohde*, 257 U.S. 469, 42 S.Ct. 157, 66 L.Ed. 321 (1922), which were abandoned in *Davis v. Dept. of Labor*, 317 U.S. 249, 63 S.Ct. 225, 87 L.Ed. 246 (1942).

Administrative law judges' decisions have found fixed platforms in territorial waters to be located upon navigable waters for the purposes of the LHWCA. Neal v. Wilson Wireline Services, 2 BRBS 88 (1975); Henning v. Vacco Wireline Services, 2 BRBS 87 (1975); Wiley v. Wilson Wireline Services, 2 BRBS 86 (1975). A commentator on this area has favored including workers on such structures within LHWCA coverage. Robertson, Injuries to Marine Petroleum Workers: A Plea for Radical Simplification, 55 Tex.L.Rev. 973 (1977). Robertson says that "the handful of post-1972 coverage determinations suggest that work on fixed platforms meets the new navigable waters criteria." *Id.* at 994. He notes that the Benefits Review Board has had some difficulty, however, with finding these workers to be in maritime employment. He criticizes this hesitation:

> [W]hile the work done by fixed-platform workers may have been "basically the same whether performed on land or on the off-shore platform," the hazards certainly were not the same. All workers on drilling apparatus at sea are subject to hazards peculiar to the sea in addition to the entire range of dangers intrinsic to oilfield work. Men whose work involves the dangers incident to the movement of watercraft should continue to be classed as seamen. Others who are threatened

The decision that fixed-platform workers in territorial waters are not excluded from coverage because of their unique workplace does not end our inquiry in Gray's case. We must still determine whether he is within the Act's protection. The Act's situs and status tests must be satisfied. Compensation is payable under the LHWCA only if the disability results from "an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, ... or other adjoining area customarily used by an employer in loading, unloading, repairing or building a vessel)." 33 U.S.C. § 903(a). The situs test in section 903(a) requires that the injury occur upon navigable waters or in an area adjoining navigable waters. The status test in section 902(3) requires that the worker be an employee which is defined as "any person engaged in maritime employment" 33 U.S.C. § 902(3).

Gray's case is slightly different from those presented by our prior decisions in *Boudreaux*, or *Ward v. Director, Office of Workers' Compensation Programs*, 684 F.2d 1114 (5th Cir. 1982), cert denied, __ U.S. __, 103 S.Ct. 815, 74

(Footnote 2 continued)

> by the dangers the ocean presents to a structure temporarily or permanently positioned on or in it should be classed as maritime workers. To exclude from the Longshoremen's Act workers on fixed-platforms within three miles from shore would produce an anomalous situation: All floating-rig workers would be entitled to maritime rights, either as seamen or as employees covered by the Longshoremen's Act; and workers on fixed platforms located beyond the three-mile line would be covered by the Longshoremen's Act by virtue of the Lands Act extension; but fixed-platform workers hurt within three miles from shore would be excluded from the domain of maritime remedies. Given the similarities in the hazards faced by all these workers, this distinction seems wholly unwarranted.

Id. at 995-96.

L.Ed.2d 1013 (1983), or the Supreme Court's recent pronouncement in *Director, Office of Workers' Compensation Programs v. Perini*, __ U.S. __, 103 S.Ct. 634, 74 L.Ed.2d 465 (1983). In *Boudreaux*, the worker was injured on a drilling barge which was located upon navigable waters. *Boudreaux*, 680 F.2d at 1035-36. In *Ward*, the decedent was a pilot who "spotted fish" from on high. He was killed when his plane crashed into navigable waters. *Ward*, 684 F.2d at 1115. In *Perini*, the injured worker was standing on a cargo barge which was upon navigable waters. *Perini*, 103 S.Ct. at 638. These workers were covered because even before the 1972 amendments they were within the Act's reach to those employed on actual navigable waters. Gray on the other hand was injured while working on a fixed platform which *Rodrigue* requires be treated as an island. By its function the platform is a wharf. By its location, extending from an island it adjoins navigable waters. Therefore, the situs of Gray's injury was literally within the expanded shoreside coverage of the Act.

The status test was also added to the Act by the 1972 amendments. The intent of Congress in making these amendments was to expand the shoreside reach of the Act. *Boudreaux v. American Workover, Inc., supra.* The status test was added to identify those workers who would be covered within this new area. *Id.* The status test does not require a rigorous analysis for water-based workers injured upon navigable waters. Their coverage under the Act is nearly automatic. *Id.* at 1039; *Ward*, 684 F.2d at 1116. Deciding whether Gray was an employee of an employer engaged in maritime employment will determine whether he qualifies for coverage.

Maritime employment turns not on geography, but on the maritime nature of the work. *P. C. Pfeiffer Co. v.*

Ford, 444 U.S. 69, 73-83, 100 S.Ct. 328, 332-37, 62 L.Ed.2d 225 (1979). The purpose of the work is the central inquiry, not the particular skills used by the worker. *Trotti & Thompson v. Crawford* 631 F.2d 1214, 1221 n. 16 (5th Cir. 1980). The test to be used in this analysis is whether the work bore "a realistically significant relationship to traditional maritime activity." *Mississippi Coast Marine, Inc. v. Bosarge*, 637 F.2d 994, 998 (5th Cir. 1981). We must determine then whether Gray's work had a realistically significant relationship to traditional maritime activity involving navigation and commerce on navigable waters. *Odom Construction Co. v. United States Department of Labor*, 622 F.2d 110, 113 (5th Cir. 1980), *cert. denied*, 450 U.S. 966, 101 S.Ct. 1482, 67 L.Ed.2d 614 (1981).

Perini established that the use of this test is not necessary for water-based workers injured upon navigable waters. It reversed the United States Court of Appeals for the Second Circuit which applied the "realistically significant relationship" test to water-based workers. 103 S.Ct. at 639. *Perini* held that application of the status and situs tests must not be used to withdraw LHWCA coverage from workers, like Boudreaux, who were covered prior to the 1972 amendments. The fact that they were injured upon actual navigable waters is enough. This reasoning does not apply here. The "realistically significant relationship" test remains viable for workers injured upon land, be it natural or artificial. Gray is not within the group of workers traditionally covered prior to 1972. He was injured not upon navigable waters but on a wharf adjoining them.

Gray did welding and maintenance work on offshore platforms. At the time of his injury, he was welding gas lines. His work was necessary for the offshore drilling process in that gas line maintenance is vital to the drilling and

removal of gas and oil. Offshore drilling—the discovery, recovery and sale of oil and natural gas from the sea bottom—is maritime commerce. *Pippen v. Shell Oil co.*, 661 F.2d 378, 384 (5th Cir. 1981). Since Gray's work was a central part of that process, it obviously facilitated maritime commerce. Indeed, his work was "an intregral part" of maritime commerce, "an essential and indispensable step" in the offshore drilling process. *Hullinghorst Industries v. Carroll*, 650 F.2d 750, 756 (5th cir. 1980), *cert. denied*, 454 U.S. 1163, 102 S.Ct. 1037, 71 L.Ed.2d 319 (1982). He was clearly employed in maritime employment and therefore was within the compensation coverage afforded by the LHWCA.

For the reasons stated the order of the Benefits Review Board is

AFFIRMED.

APPENDIX "B"

HERB'S WELDING and United States Fidelity & Guaranty Company,
Petitioners,

v.

Robert H. GRAY and the Director, Office of Workers' Compensation Programs, United States Department of Labor,
Respondents.

No. 82-4147

United States Court of Appeals,
Fifth Circuit.

Aug. 8, 1983

Upon petition for rehearing and suggestion for rehearing en banc a decision of the United States Court of Appeals for the Fifth Circuit, 703 F.2d 176, which affirmed the Benefits Review Board's award of compensation under the Longshoremen's and Harbor Workers' Compensation Act applied to offshore oil field worker who was injured upon a platform located in Louisiana waters.

Petition and suggestion denied.

Petition for Review of an Order of the Benefits Review Board

ON PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING
EN BANC

(Opinion April 18, 1983, 5th Cir. 1983,

703 F.2d 176).

Before CLARK, Chief Judge, THORNBERRY and REAVLEY, Circuit Judges.

PER CURIAM:

Herb's Welding, United States Fidelity & Guaranty Company and various *amici curiae* have petitioned this court for a panel or en banc rehearing of this case.

We address one point raised by Herb's Welding and its carrier. They suggest that our decision is contrary to our previous decision relating to the same accident. *Gray v. Chevron*, 644 F.2d 540 (5th Cir. 1980). There the same Robert H. Gray brought a tort action against Chevron, the owner of the fixed platform. Gray alleged his injuries were due to Chevron's negligence. Chevron moved for summary judgment claiming that under Louisiana workers' compensation law, it was Gray's statutory employer. Gray opposed the motion arguing that under the terms of the Outer Continental Shelf Lands Act, 43 U.S.C. § 1333(b), the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq.*, was made applicable to his situation. (This is the same argument which the Benefits Review Board approved below in *Herb's Welding v. Gray*, but which we found unnecessary to reach). The district court in *Gray v. Chevron*, No. 76-0708 (W.D.La.1978), granted the summary judgment and dismissed the suit. The judge concluded that the Outer Continental Shelf Lands Act did not apply; that Louisiana law applied; that Chevron was Gray's statutory employer, and that as to Chevron, Gray's sole remedy was workers' compensation benefits. This court affirmed.

Herb's Welding acknowledges that the law of the case doctrine does not apply. However, it argues that if the LHWCA applies to Gray's accident, then Chevron could not assert a statutory employer defense since such immunity is not available under the federal act.

Our previous decision in *Gray v. Chevron* does not control our present case. The *Gray v. Chevron* opinion was rendered in 1978. It was affirmed in 1981 on the narrow issue of whether the district court correctly interpreted Louisiana's workers' compensation law in light of this court's decision in *Blanchard v. Engine and Gas Compressor Services, Inc.*, 613 F.2d 65 (5th Cir. 1980). Today's case, *Herb's Welding v. Gray*, is based on an inconsistent premise that the Longshoremen's and Harbor Workers' Compensation Act is applicable. Two facts, however, persuade us that *Gray v. Chevron* should not control here. First, *Gray v. Chevron* held that the Outer Continental Shelf Lands Act did not extend LHWCA coverage to Gray. That is not contrary to our present decision. It was not asserted at that time that the LHWCA could apply independent of the Lands Act. Second, since the initial decision, the LHWCA has undergone extensive interpretation. We must now consider the LHWCA in light of *Director, Office of Workers' Compensation Programs v. Perini*, __ U.S. __, 103 S.Ct. 634, 74 L.Ed.2d 465 (1983); *Ward v. Director, Office of Workers' Compensation Programs*, 684 F.2d 1114 (5th Cir. 1982), *cert. denied*, __ U.S. __, 103 S.Ct. 815, 74 L.Ed.2d 1013 (1983); and *Boudreaux v. American Workover, Inc.*, 680 F.2d 1034 (5th Cir. 1982) (en banc), *cert. denied*, __ U.S. __, 103 S.Ct. 815, 76 L.Ed.2d __ (1983). Given the guidance of these subsequent precedents it is obvious that the LHWCA on its own terms applies to Gray. This position was neither advocated nor decided in *Gray v. Chevron*.

The petition for panel rehearing is DENIED and no member of this panel nor Judge in active service on the Court having requested that the Court be polled on rehearing en banc, the suggestion for rehearing en banc is also DENIED.

APPENDIX "C"

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036
211 Main Street, Suite 600
San Francisco, California 94105
(415) 556-0555

In the Matter of

ROBERT H. GRAY
Claimant

v.

HERB'S WELDING
Employer

U. S. F. & G.
Carrier

CASE NO. 77-LHCA-1308

OWCP NO. 7-39270

T. Gerald Henderson, Esquire
Gravel, Roy & Burnes
P.O. Box 1792
Alexandria, Louisiana 71301
For the Claimant

John F. Simon, Esquire
Gold, Little, Simon, Weems & Bruser
P.O. Box 1431
Alexandria, Louisiana 71301
For the Employer
and Carrier

Before: BEN H. WALLEY
Administrative Law Judge

DECISION AND ORDER

This is a claim for compensation benefits under the provisions of the Longshoremen's and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. § 901, *et seq.*, hereinafter referred to as the Act, as extended to cover certain employees under the Outer Continental Shelf Lands Act, (OCSLA), 67 Stat 462. 43 U.S.C. §§ 1331, *et seq.*, hereinafter referred to as the Lands Act, which claim is for benefits because of an injury sustained while working as a welder on a fixed platform located within Bay Marchand Area, Block 3, State Lease Number 1367, within the territorial waters of the State of Louisiana.

Claimant has been paid temporary total disability, permanent partial disability, and medical expenses incident thereto under Louisiana State Compensation Laws and is now seeking to come under the provisions of the Longshoremen's and Harbor Workers' Compensation Act.

Findings of Fact and Conclusions of Law

The parties agreed and stipulated to certain essential facts, which I accept, as follows: (1) Robert H. Gray, hereafter Claimant, sustained an injury on July 11, 1975, while working on a fixed platform, described as "E" Structure, in Bay Marchand Area, Block 3, State Lease No. 1367, in Louisiana State waters; (2) that Claimant was injured in the course of his employment with Herb's Welding, hereafter Employer, who was insured by United States Fidelity and Guaranty, hereafter Carrier, and was paid temporary total disability, permanent partial disabili-

ty and medical expenses incident thereto; (3) that Claimant's average weekly wage at the time of injury was $282.75; and for purposes of this hearing only, Claimant had suffered a ten (10) percent permanent partial impairment to the leg.

In addition, Claimant was paid temporary total disability benefits from July 11, 1975 to December 31, 1975, in the amount of $1,300.00; was paid the sum of $17.50 per week, the minimum under Louisiana law for a ten (10) percent permanent partial disability to the leg, for 107 weeks, in the amount of $1,872.50, making a total of $3,172.50; and the sum of $1,696.14 was paid for medical expenses. The only issue unresolved was whether this claim comes within the provisions of the Act.

The answer to the question of whether Claimant comes within the provisions of the Act can only be found in a determination that his work activities constitute "Maritime employment" within the meaning of section 2(3) of the Act, 33 U.S.C. § 902(3). Clearly, Claimant's work activity was on structure "E" situated wholly within the territorial waters of the State of Louisiana. He testified that he was quartered on Structure "M" for the entire week of July 10-16, 1975, and that his entire work-week was spent doing welding assignments, including but not limited to oil and gas field lines, on Structures "E", "D", "C & I", "C", "M" and "H", all of said structures being located wholly on the inward side of both the line of demarcation between the territorial waters of the State of Louisiana and the outer Continental Shelf and the "three mile line", identifying the "boundaries" of the State of Louisiana. An examination of the map (Pg. 1, Ex. 1), reveals two "lines" from well "18" to "E" structure and one "line" from Structure "M" to "E", with three "lines" running northward to

"C & I" structure. Thus, all of the oil and/or gas lines identified on the map show that they originate from or terminate at a well site or a fixed platform (structure) located wholly within the territorial waters of the State of Louisiana. Too, Claimant testified that he "had liked the Bay Marchand Field and had asked for a permanent job in the Bay Marchand Field" and was assigned to the northern part of that area in the latter part of 1972.

Claimant's work activity is totally involved in exploration, development and transmission of oil and gas from under and on submerged lands. His employer is likewise engaged. These activities are not relevant to traditional concerns of maritime law. *Rodrigue v. Aetna Casualty and Surety Co., et al.*, 395 U.S. 352, 23 L.Ed.2d 360, 89 S.Ct. 1835 (1969); *Bible v. Chevron Oil Co.*, 5th Cir. 460 F.2d 1218 (1972). Claimant's activity as a maintenance welder lacks any significant maritime connection. *Anderson v. McBroom Rig Building Service, Inc.*, 5 BRBS 713, BRB No. 75-198 (4/7/77); *Toups v. Chevron Oil Co., et at.*, 7 BRBS 261, BRB No. 76-453 (12/29/77).

Therefore, I find and conclude from the entire record of this cause that the claim does not come within the provisions of the Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C. § 901, *et seq.*), and that Claimant has been properly compensated for the injuries sustained under the laws of the State of Louisiana.

Order

Having found and concluded that the claim for benefits does not come within the provisions of the Longshoremen's and Harbor Workers' Compensation Act as extended by the Outer Continental Shelf Act, the claim

is hereby denied.

/S/ BEN H. WALLEY

BEN H. WALLEY
Administrative Law Judge

Dated: May 5, 1978
San Francisco, California

APPENDIX "D"

BENEFITS REVIEW BOARD
U.S. DEPARTMENT OF LABOR

No. 78-431

ROBERT H. GRAY
Claimant-Petitioner

v.

HERB'S WELDING
and
U.S. FIDELITY AND GUARANTY
Employer/Carrier-Respondents

Filed As Part Of The Record
June 17, 1980

(Clerk)
Benefits Review Board

DECISION and ORDER

Appeal from the Decision and Order of Ben H. Walley, Administrative Law Judge, U.S. Department of Labor.

T. Gerald Henderson (Gravel, Roy & Burnes), Alexandria, Louisiana, for the claimant.

Robert H. Gregory, Miami, Florida, for the employer/carrier.

Before: SMITH, Chief Administrative Appeals Judge, MILLER and KALARIS, Administrative Appeals Judges.

Kalaris, Administrative Appeals Judge:

This is an appeal by claimant, Robert H. Gray, from a Decision and Order (77-LHCA-1308) of Administrative Law Judge Ben H. Walley, pursuant to the provisions of the Longshoremen's and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (hereinafter, LHWCA), and extended by the Outer Continental Shelf Lands Act (hereinafter, OCSLA), 43 U.S.C. §1331 *et seq.*

Claimant was injured while working as a welder on a fixed platform located within the territorial waters of the state of Louisiana.

At a hearing before the administrative law judge, the parties agreed and stipulated to the following facts, which were subsequently adopted by the administrative law judge: claimant sustained an injury on July 11, 1975, while working on a fixed platform, described as an "E" structure, in Bay Marchand area, Block 3, State Lease No. 1367, in Louisiana state waters; claimant was injured in the course of his employment with Herb's Welding (hereinafter, employer), a company insured by U.S. Fidelity and Guaranty; claimant was paid temporary total disability, permanent partial disability and medical expenses incident thereto under Louisiana State workmen's compensation law; claimant's average weekly wage at the time of injury was $282.75; and, for purposes of the hearing only, claimant had suffered a 10 percent permanent partial impairment to his leg.

The sole issue at the hearing was whether the claim came within the provisions of the Act. In his Decision and Order, the administrative law judge commented that, in order to resolve the issue of coverage, he had to determine

whether claimant's work activities constituted "maritime employment" within the meaning of Section 2(3) of the Act. 33 U.S.C. §902(3). He concluded that claimant was not engaged in "maritime employment." This conclusion was based largely on findings me made as to claimant's employment activities and the nature of employer's business. Specifically, the administrative law judge found that claimant's employment activity was situated wholly within the territorial waters of the State of Louisiana. He further noted that claimant testified that he was quartered on structure "M" for the entire week of July 10-16, 1975, and that his entire work week was spent doing welding assignments, including but not limited to oil and gas field lines on Structures, E, D, C and I, C, M and H—each structure being located wholly on the landward side of both the line of demarcation between the territorial waters of Louisiana and the outer Continental Shelf and the three-mile line identifying the boundary of the State of Louisiana in the Gulf of Mexico. In addition, having examined the map offered into evidence as Claimant's Exhibit 1, the judge concluded that all of the oil and/or gas lines identified in the map show that they originate from or terminate at a well site or a fixed platform located wholly within Louisiana territorial waters.

The administrative law judge determined that claimant's work activity totally involved the exploration, development and transmission of oil and gas from under and on submerged lands and, furthermore, that claimant's employer was similarly engaged. Citing the Supreme Court decision *Rodrigue v. Aetna Casualty & Surety Co.*, 395 U.S. 352 (1969), the administrative law judge observed that "these activities are not relevant to traditional concerns of maritime law." In addition, relying on *Anderson v. McBroom Rig Building Service Inc.*, 5 BRBS 713, BRB

No. 75-198 (1977), and *Toups v. Chevron Oil Co.*, 7 BRBS 261, BRB No. 76-453 (1977), the administrative law judge found that "claimant's activity as a maintenance welder lack[ed] any significant maritime connection." The administrative law judge therefore held that the claim did not come within the provisions of the Act, and that claimant had been properly compensated under state workmen's compensation law.

We must first determine whether the administrative law judge erred in relying upon *Toups, supra*, and *Anderson, supra*, to conclude that claimant had to demonstrate work activities which constitute "maritime employment." The claims in those cases were filed pursuant to the LHWCA; claimant in the instant case seeks benefits under the OCSLA. A clear distinction must be drawn between the jurisdictional tests of the LHWCA and the OCSLA, and we hold that the administrative law judge erred in applying the "maritime employment" test of the LHWCA to a claim under OCSLA.[1]

Claimant contends that jurisdiction is not determined solely by the location of the accident, arguing that it would be unreasonable to determine entitlement on the

[1] As the court stated in *Goodart v. Maryland Casualty Co.*, 139 So.2d. 567 (La.App. 1962), "Plaintiff contends that the OCSLA applies only to maritime workers. We can find no such requirement in the Act...." 139 So.2d. at 570. *See also* Larson, *The Law of Workmen's Compensation*, 89.33 at 16-189: "Although the constitutional maritime power of the United States includes not only the navigable waters of the United States but the high seas as well, it seems clear from the choice of statutory language that Congress intended to confine the Longshoremen's Act to the territorial navigable waters of the United States. This intent is indicated by the fact that, when Congress wanted to cover injuries sustained in oil drilling operations beyond the territorial waters of the United States, it felt it necessary to pass a separate act, the Outer Continental Shelf Act, applying the provisions of the Longshoremen's Act to such injuries."

basis of such a fortuitous factor as where the claimant was located when injured. Citing 43 U.S.C. §1333(b), he maintains that the issue is whether the controversy "arises out of or in connection with" operations on the outer Continental Shelf involving transportation of natural resources, and urges that the jurisdictional test should be whether claimant's overall duties bear a fair and substantial relationship to the exploration and transportation of natural resources from the outer Continental Shelf. This test, claimant suggests, is dictated by case precedent.[2]

We agree with claimant that he is not precluded from coverage by the OCSLA simply because he was injured in state territorial waters and that the "strict locality" test urged by employer[3] is not mandated by the OCSLA. We also find coverage. However, our ruling is based upon a rationale different from that proffered by claimant.

Section 1333(b), upon which claimant relies, provides in pertinent part:

> The United States district courts shall have original jurisdiction of cases and controversies

[2] Claimant cites the cases of *Nations v. Morris*, 483 F.2d. 577 (5th Cir. 1973), *cert. denied*, 414 U.S. 1071 (1973), and *Higginbotham v. Mobil Oil Corp.*, 357 F. Supp. 1164 (W.D. La. 1973), *rev'd in part*, 545 F.2d 422 (5th Cir. 1977), in support of his argument. However, we decline to adopt claimant's contentions on the ground that both cases involved accidents occurring on the high seas, over the outer Continental Shelf, not in state territorial waters.

[3] At oral argument held before the Board December 19, 1979, employer's counsel, when questioned regarding a "situs test," responded, "[I]f you have a direct line, you are sending in the oil from the outer continental shelf and that line comes within the three-mile area of the state and these is a welder down there under the water welding, that, I would concede that probably under the Lands Act he is entitled to benefits." (Oral Argument Transcript, pp. 36-37)

> arising out of or in connection with any operations conducted on the outer Continental Shelf for the purpose of exploring for, developing, removing or transporting by pipeline the natural resources of the subsoil and seabed of the outer Continental Shelf.

43 U.S.C. §1333(b).[4] We interpret Section 1333(b) as vesting in the district courts[5] the power to adjudicate controversies arising out of or in connection with any operations therein described. It reflects the intent of Congress to establish a "comprehensive, unqualified, unlimited claim of Federal sovereignty" over outer Continental Shelf activities. *Pure Oil Co. v. Snipes*, 293 F.2d. 60 (5th Cir. 1961). *See also Fluor Ocean Services, Inc. v. The Rucker Co., Inc.*, 341 F. Supp. 757 (E.D. La. 1972). Therefore, while this subsection establishes federal jurisdiction over cases arising out of or in connection with the operations it describes, it does not establish the parameters of coverage of the OCSLA for workmen's compensation claims. It therefore does not confer coverage of the OCSLA over this claim.

However, Section 1333(c) does establish those parameters and does confer coverage over this case. That section provides, in pertinent part, that "[w]ith respect to disability or death of an employee resulting from any injury occurring as the result of operations described in

[4] In 1978, the statute was amended, and a few significant changes in the language and organization of the statute were made. *See* 3 *U.S. Code Cong. & Adm. News* 1534, 1568 (1978). However, we conclude that the unamended OCSLA is applicable to the instant case since both the injury and the disability occurred prior to the passage of the amendments.

[5] See discussion *infra* at fn. 6, with reference to Section 1333(c), delineating from what source the Board derives its power to adjudicate claims under the OCSLA.

[Section 1333(b)], compensation shall be payable under the provisions of the Longshoremen's and Harbor Workers' Compensation Act." 43 U.S.C. §1333(c).[6] As stated earlier, those operations are

> operations conducted on the outer Continental Shelf for the purpose of exploring for, developing, removing or transporting by pipeline the natural resources of the subsoil and seabed of the outer Continental Shelf....

43 U.S.C. §1333(b). Section 1331(a) defines the term "outer Continental Shelf" as "all submerged lands lying outside of the areas of land beneath navigable water" as defined in Section 1301 of the Submerged Lands Act. 43 U.S.C. §1331(a); 43 U.S.C. §1301. The definition of "lands beneath navigable waters" is complex; however, for the most part, state boundaries lie three miles from the coastlines and the area within that three-mile limit are lands beneath navigable water.

Accordingly, to establish coverage one must prove a

[6] Section 1333(c) incorporates by reference Section 19(b) of the LHWCA, as amended, which transferred from the federal district courts to the Board the power to review claims arising under the LHWCA and its extensions, including the OCSLA. 33 U.S.C. §919(b). Thus, the Board has the power to hear this claim and others filed pursuant to the OCSLA.

Section 21(c) of the amended LHWCA provides, in pertinent part, that the Board's decisions are reviewable in the United States Court of Appeals. 33 U.S.C. §921(c). Citing *Presley v. Tinsley Maintenance Service*, 529 F.2d. 433 (5th Cir. 1976) and *Offshore Food Service, Inc. v. Benefits Review Board*, 524 F.2d. 967 (5th Cir. 1975), the Fifth Circuit in *Director, OWCP v. Alabama By-Products Corp.*, 560 F.2d 710 (1977), noted that it has entertained petitions for review of OCSLA awards processed under amended LHWCA procedures, thereby recognizing the jurisdiction of the Board over cases brought under the OCSLA. *See also Pearce v. Director, OWCP*, No. 77-2074 (9th Cir. August 31, 1979).

disability or death resulting from any injury *occurring as a result* of operations conducted on the outer Continental Shelf for the purpose of exploring for, develcping, removing or transporting by pipeline the natural resources of the subsoil and seabed of the outer Continental Shelf.

Evidence was adduced at the hearing that established that claimant's work was performed both in territorial waters and on the outer Continental Shelf; in fact, claimant estimated that approximately 25 percent of his time was spent aboard the K and M platforms located on the outer Continental Shelf. Moreover, the platform on which claimant was injured was fed by a gas flow line that extended out to the outer Continental Shelf. Finally, the operations conducted by employer were located on both sides of the three-mile line of demarcation.

Insofar as claimant's employment as a maintenance welder is integrally related to the operations enumerated in Section 1333 of the OCSLA, and insofar as his injury was incurred as a result of such activity, we hold that claimant has established coverage under the Act.

Accordingly, we reverse the decision below, and remand for further proceedings in accordance with this determination.

SO ORDERED.

/S/ISMENE M. KALARIS
ISMENE M. KALARIS
Administrative Appeals Judge

I Concur:

/S/JULIUS MILLER
JULIUS MILLER
Administrative Appeals Judge

SMITH, Chief Administrative Appeals Judge, dissenting:

I respectfully dissent from the majority's reversal of the decision below. I do agree with some of their reasoning: (1) that the unamended Outer Continental Shelf Lands Act (hereinafter, OCSLA), 43 U.S.C. §1333, applies to this case; (2) that the "maritime employment" status test in Section 2(3) of the Longshoremen's and Harbor Workers Compensation Act (hereinafter, LHWCA), 33 U.S.C. §902(3), which the administrative law judge applied, is inapplicable to a case arising under OCSLA; and (3) that the administrative law judge's reliance on *Anderson v. McBroom Rig Building Service, Inc.*, 5 BRBS 713, BRB No. 75-198 (1977), and *Toups v. Chevron Oil Co.*, 7 BRBS 261, BRB No. 76-453 (1977) was erroneous, since these cases were brought only under the LHWCA. However, I strongly disagree with the majority's construction of Section 1333(b) & (c) and their finding of jurisdiction in this case.

To establish jurisdiction, a claimant must prove:

> ...disability or death of an employee resulting from an injury occurring as a result of operations described in subsection (b) [operations conducted on the outer Continental Shelf for the purpose of exploring for, developing, removing or transporting by pipeline the natural resources, or involving rights to the natural resources of the subsoil and seabed of the outer Continental Shelf]...For the purposes of the extension of the provisions of the Longshoreman's and Harbor Workers' Compensation Act under this section—(1) the term "employee" does not include a master or member of the crew of any vessel, or an officer or employee of the U.S. or any agency thereof or of any State or foreign government, or any political subdivision thereof; (2) the term "employer" means an

> employer any of whose employees are employed in such operations...

43 U.S.C. §1333(c). The claimant in this case was an employee who was injured on an oil platform in state territorial waters but who performed 25 percent of his work duties (welding oil pipelines) on the Outer Continental Shelf. There is no case law on point which applies the section above to such facts.

Section 1333(c) is ambiguous on its face. Several questions arise: Does the language mandate a moment of injury test and a situs test? How broadly or narrowly should the phrase "as a result of operations" be construed? Must the employee have actually worked on the Outer Continental Shelf at the time of his injury, or is he covered if he worked in part over the Outer Continental Shelf even though his injury did not occur there?

Since Section 1333(c) is ambiguous, the Congressional intent in enacting the OCSLA must be determined.

> In expounding a statute, we must not be guided by a single sentence or member of a sentence, but [must] look to the provisions of the whole law, and to its object and policy... [Cites omitted] Our objective...is to ascertain the congressional intent and give effect to the legislative will... [I]t is a familiar rule that a thing may be within the letter of the statute and yet not within the statute, becasue not within its spirit nor within the intention of its makers...

Philbrook v. Glodgett, 95 S.Ct. 1893, 1898 (1975).

> Where a word or phrase is reasonably capable of more than one meaning, a court should look to the

> entire text of the statute and to its legislative history in order to ascertain, if possible, the intent of the drafters and the true scope and meaning of the term.

Schwartz v. Romnes, 495 F.2d 884, 849 (2d Cir. 1974).

Examination of the entire statute reveals that the scope of OCSLA is confined to a specific geographic area—the Outer Continental Shelf—which is defined in Section 1331(a). The definition is all submerged lands lying seaward of "lands beneath navigable waters" as defined in the Submerged Lands Act, 43 U.S.C. §1301(a). The jurisdiction of the OCSLA is stated in Section 1332(a):

> It is hereby declared to be the policy of the U.S. that the subsoil and seabed of the outer Continental Shelf appertain to the U.S. and are subject to its jurisdiction, control, and power of disposition as provided in this Act.

The Act provides for federal leasing and federal power to regulate the conservation of the natural resources but only for the Outer Continental Shelf. 43 U.S.C. §§1334, 1335, 1337. The Coast Guard is authorized to promulgate and enforce regulations to promote safety of life and property but only for artificial islands and structures on the Outer Continental Shelf. 43 U.S.C. §1333(e)(1); 33 C.F.R. §140.05-1. It is significant that Congressional concern for safety conditions affecting employees did not extend to artificial islands in state territorial waters.

The legislative background of the OCSLA and the Submerged Lands Act was summarized in *Zabel v. Tabb*, 430 F.2d 199, 205 (5th Cir. 1970), *cert. den.*, 401 U.S. 910

(1971).[1]

> The controversy, often pressed with emotional overtones, was over oil and gas and whether the states were to reap the economic benefits of development royalties and to regulate the exploration and development or whether these benefits and these controls were be exercised by the Federal Government as an adjunct of then newly declared "paramount rights". *United States v. California*, 1947, 332 U.S. 804, 805, 68 S.Ct. 20, 21, 92 L.Ed. 382, 383. The Act and this relinquishment [quitclaim to the coastal states of submerged lands within three miles of the coast] reflect the legislative compromise found in the combination of the Submerged Lands Act and the Outer Continental Shelf Act. The adjacent states were to be the "owner" of the resources and reap exclusively the economic benefits of resources in the tidelands and have full control over management and exploitation. The Federal Government, on the other hand, was given exclusive ownership and control vis-a-vis the states in the Outer Continental Shelf.

The Supreme Court reviewed the legislative history of the OCSLA in *Rodrigue v. Aetna Casualty and Surety Co.*, 89 S.Ct. 1835, 1837-1838 (1969(.[2]

---

[1] *Zabel* was an action by landowners to compel the Secretary of the Army to issue a permit to dredge and fill in navigable waters of a by. The court held that the Submerged Land Act does not relinquish Congress's constitutional power over commerce to regulate use of submerged riparian property for conservation purposes.

[2] *Rodrigue* involved wrongful death actions, where the workers died on artificial island drilling rigs located on the Outer Continental Shelf off the Los Angeles coast. The issue was whether the High Seas Act or the OCSLA with its incorporation of state law (under certain circumstances) applied. The court held the latter applied.

> The purpose of the [Outer Continental Shelf] Lands Act was to define a body of law applicable to the seabed, the subsoil, and the fixed structures...on the Outer Continental Shelf. That this law was to be federal law of the United States, applying state law only as federal law and then only when not inconcistent with applicable federal law, is made clear by the language of the Act.... It is evident from this that federal law is "exclusive" in its regulation of this *area*, and that state law is adopted only as surrogate federal law.... [emphasis added]
>
> As Senator Anderson, a member of the conference committee, put it: "The real point is...that the language in Section 4 [43 U.S.C. §1333] provides that Federal laws and regulations shall be applicable in the *area*, but that where there is a void, the State law may be applicable.... [emphasis added]

The court noted Senator Gordon's explanation of the bill's inception:

> The committee first attempted to provide housekeeping law for the outer shelf by applying to the structures necessary for the removal of the minerals in the area under the maritime law of the United States. This was first attempted by incorporating by reference the admiralty statutes. This solution at first seemed to be a reasonably complete answer * * * inasmuch as the drilling platforms would have been treated as vessels. Maritime law, which applies to American vessels, would have applied under that theory to the structures themselves.
>
> However, further consideration clearly showed that this approach was not an adequate and

complete answer to the problem. The so-called social laws necessary for protection of the workers and their families would not apply. I refer to such things as unemployment laws, *industrial-accident laws*, fair-labor-steward laws, and so forth.

[Ultimately, instead,] the whole body of Federal law [was made applicable] to the *area* [as well as state law where necessary]. Thus, the legal situation is comparable to that in the areas owned by the Federal Government under the exclusive jurisdiction of the Federal Government and lying within the boundaries of a State in the uplands. 99 Cong. Rec. 6963. [emphasis added].

Another strong indication of the Congressional intent that the OCSLA's incorporation of the LHWCA is to apply only to a specific geographic area is contained in the 1953 Conference Report for the OCSLA.

> ...Certain Federal laws are made applicable to the *area*, such as the Longshoremen's and Harbor Workers' Act.... [emphasis added]

1953 *U.S. Code Cong. and Adm. News* 2177, 2184.

Two cases, not on point with the facts of this case, emphasize the geographic area contemplated by the OCSLA and a moment of injury test. In the first case, *Reagan Equipment Co. v. P. J. Donovan*, 296 F.Supp. 535 (E.D. La. 1968), one of the issues on appeal was whether the claim was a state or federal compensation matter. The court affirmed the Deputy Commissioner's conclusion that the OCSLA applied, because the injury which caused decedent's death occurred within the geographic area contemplated by the Act. In the second case, *Bible v.*

Chevron Oil Co., 460 F.2d 1218 (5th Cir. 1972), the court applied a situs test in concluding that the OCSLA has no application to a personal injury case, where the drilling platform upon which appellant was injured was located within Louisiana territorial waters about a mile from the coast. The court held that the case was a non-maritime diversity suit controlled entirely by Louisiana law.

In summary, examination of the entire statute, the legislative history, and the two cases cited above indicate that the legislative intent was that the scope of application of the OCSLA is *only* to the geographic area of the Outer Continental Shelf. Since the OCSLA itself has no applicability to areas other than the Outer Continental Shelf, the incorporation of the LHWCA in Section 1333(c) likewise cannot extend to other areas, such as state territorial waters. Section 1333(c) must be read in context with 43 U.S.C. §1333(a)(1) which extends federal laws only to the Outer Continental Shelf. Thus, the phrase "injury occurring *as the result of* operations..." should be construed to provide coverage only when the injury (leading to disability or death) arises from or is the specific consequence of operation(s) conducted on the Outer Continental Shelf and the injury also occurs there.[3]

The majority's interpretation of Section 1333(c) disregards the Congressional intent of the scope of application of the OCSLA and tremendously expands the geographic

---

[3] The phrase "as a result of" was construed to avoid a fortuitous result in *Higginbotham v. Mobil Oil Corp.*, 357 F. Supp. 1164 (W.D. La. 1973), *rev'd in part*, 545 F.2d 422 (5th Cir. 1977), where the court applied the OCLSA to a decedent killed in a helicopter crash in the high seas *over* the Outer Continental Shelf. The crash occurred some distance from the stationary platform where he had been temporarily assigned. The interpretation indicates the limit of flexibility Congress probably intended by using the phrase "as a result of...."

area to which the incorporated LHWCA applies. The majority has apparently adopted a jurisdiction test which looks to whether the employee's job duties are "integrally related" to operations on the Outer Continental Shelf and whether his injury was incurred as a result of such activity.

In finding coverage, the majority cites as support the fact that the platform in state territorial waters on which claimant was injured was fed by a gas flow line that extended out to the Outer Continental Shelf.[4] However, the evidence is that claimant's injury was not "as a result" of an operation conducted on the Outer Continental Shelf. The pipeline which claimant was welding at the time of injury did not extend to the Outer Continental Shelf, but only went from one part of the platform to another part of it. Hearing Transcript, p. 42. *See also,* Oral Argument Transcript, p. 14.

The majority's reliance on the "fact" of a pipeline connection from an artificial island in state territorial waters to the Outer Continental Shelf has the practical effect that state compensation law will rarely, if ever, apply to workers injured in state territorial waters.[5] In the oil fields which straddle both the Outer Continental Shelf and adjacent state territorial waters, nearly all of the oil platforms in state territorial waters are likely to have some oil or gas pipeline connections to the Outer Continental Shelf.

[4] The administrative law judge made a contrary finding of fact. He concluded that the "E" structure on which claimant worked had no connections to the Outer Continental Shelf. Decision and Order, p.3. Claimant's Exhibit No. 1, a map of the area in which he worked, fails to indicate with any degree of certitude the connections between the different structures and the Outer Continental Shelf.

[5] Claimant's counsel admitted this at oral argument. Oral Argument Transcript, p. 16.

Where claimants can prove the connections, state compensation law will not apply under the majority's theory, despite the fact that the Submerged Lands Act gave to the coastal states:

> ...title to and ownership of the lands beneath navigable waters within the boundaries of the respective states, and the natural resources within such lands and waters, and the right and power to *manage,* administer, lease, and develop, and use the said lands and natural resources all *in accordance with applicable State law*... [emphasis added]

43 U.S.C. §1311(a). Furthermore, under the majority's extremely broad theory, an oil worker injured on state land at a gas/oil tank storage area which had pipeline connections to the Outer Continental Shelf would be covered under the OCSLA!

In finding that claimant's employment is integrally related to operations on the Outer Continental Shelf, the majority cites claimant's testimony that approximately 25 percent of his work activities or time was spent on platforms on the Outer Continental Shelf. However, there is no statutory status test that the employee's work be "integrally related" to certain operations on the Outer Continental Shelf. The only status test is that the person injured and disabled be an "employee" of an employer with any employee who is engaged in such operations and that the employee not be a master or member of a crew or an officer or employee of the U.S. or any state. *See Reagan Equipment Co. v. P. J. Donovan, supra,* which held that the OCSLA does not require that the employee himself be engaged in exploration for and recovery of natural resources nor that his employer be engaged in that

business.

In their construction of Section 1333(c), the majority appears to be rejecting a strict moment of injury test and a strict situs test. Instead, they appear to be adopting a status test analogous to the one resulting from the 1972 Amendments to the LHWCA. That test was explained in *Northeast Marine Terminal Co., Inc. v. Caputo,* 432 U.S. 249 (1977). In interpreting the 1972 Amendments which do *not* affect the OCSLA, the Court rejected the previous interpretation of Act which used a moment of injury test and instead focused on the nature of claimant's overall employment. the court extended coverage to employees on a covered situs who spend at least part of their time in longshoring acativities or the functional equivalent.

In this case, the unamended 1953 OCSLA applies. The statutory language "with respect to injury, disability or death of an employee resulting from any injury...", 43 U.S.C. §1333(c), is nearly identical to the language in Section 3(a) of the LHWCA, 33 U.S.C. §903, which was construed as mandating a moment of injury test prior to the 1972 Amendments. *See Caputo, supra,* at 265. Statutes containing similar language and sharing common *raison d'etre* should be interpreted *pari passu. Northcross v. Board of Education,* 93 S.Ct. 2201 (1973). Since the 1972 Amendments to the LHWCA did not amend §1333 of the OCSLA and since the 1978 Amendments to OCSLA (Pub. L. No. 95-372) also did not alter this jurisdictional language, there is no evidence that Congress intended to reject the moment of injury test in the OCSLA.

Thus, I would affirm the administrative law judge's denial of jurisdiction under the OCSLA, given his finding (and the parties' stipulation) that claimant's injury

occurred on an oil platform in the territorial waters of Louisiana, not on the Outer Continental Shelf.

/S/SAMUEL J. SMITH
SAMUEL J. SMITH, Chief
Administrative Appeals Judge

Dated this 17th day
of June 1980

APPENDIX "E"

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
UNIT A

No. 80-3569

HERB'S WELDING and UNITED STATES FIDELITY & GUARANTY COMPANY,

Petitioners

versus

ROBERT H. GRAY and DIRECTOR, OFFICE OF WORKER'S COMPENSATION PROGRAMS, U. S. DEPARTMENT OF LABOR,

Respondents.

On Petition For Review of An Order of the Benefits Review Board

---

Before AINSWORTH, GARZA and SAM D. JOHNSON, Circuit Judges.

BY THE COURT:

IT IS ORDERED that the motion of respondent Director, Office of Workers' Compensation Programs, to dismiss the petition for review is GRANTED without prejudice to re-filing after final order of the Benefits Review Board.

APPENDIX "F"

U.S. DEPARTMENT OF LABOR
Office of Administrative Law Judges
Suite 901, 1001 Howard Avenue
New Orleans, LA 70113

Case No. 77-LHCA-1308R

OWCP No. 7-39270

In the Matter of

ROBERT H. GRAY, JR.

Claimant

against

HERB'S WELDING

Employer

U. S. F. & G.

Carrier

DECISION AND ORDER ON REMAND

This is a claim for compensation benefits under the provisions of the Longshoremen's and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. §901, *et. seq.*, hereinafter referred to as the Act, as extended to cover certain employees under the Outer Continental Shelf Lands Act, (OCSLA), 67 Stat 462. 43 U.S.C. §§1331, *et seq.*, hereinafter referred to as the Lands Act, which claim is for benefits because of an injury sustained while working as a welder on a fixed platform located within Bay Marchand Area, Block 3, State Lease Number 1367, within the territorial waters of the State of Louisiana.

A hearing was held in Alexandria, Louisiana, and a Decision and Order was issued on May 5, 1978, denying the claim because it did not come within the provisions of the Longshoremen's and Harbor Worker's Compensation Act as extended by the Outer Continental Shelf Lands Act. Claimant was aggrieved and appealed the Decision and Order and, for reasons hereinafter set out, the Benefits Review Board did, on June 17, 1980, reverse the Decision and Order and remand it for further proceedings in accordance with its order. *Gray v. Herb's Welding and U.S. Fidelity and Guaranty Company,* BRB No. 78-431, 12 BRBS 752 (6-17-80).

An appeal was made to the Fifth Circuit Court of Appeals and on September 22, 1980, the Fifth Circuit dismissed the Petition for Review "without prejudice to re-filing after Final Order of the Benefits Review Board." Thus, on November 20, 1980, this case was remanded to this office "for further proceedings consistent with its Decision and Order of June 17, 1980."

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Pursuant to the Order of Remand a Notice of Hearing to be held on March 9, 1981, was issued and upon receipt of the Notice the parties were able to agree on a procedure that would eliminate the need for further hearing. The parties agreed that inasmuch as the Benefits Review Board had held that Claimant had "established coverage under the Act (which holding the Employer and Carrier dispute and intend to appeal)," supplemental facts could be furnished to meet the terms of the Order of Remand without the hearing.

Material facts of record, supplemented by facts set

out in the Brief on Behalf of the Employer and Carrier, and confirmed by letter from Counsel for Claimant dated March 6, 1981, are separately identified as to source and are set out hereafter.

At the original hearing the parties stipulated and agreed to certain facts, which I accepted, as follows: (1) Robert H. Gray, hereafter Claimant, sustained an injury on July 11, 1975, while working on a fixed platform, described as "E" Structure, in Bay Marchand Area, Block 3, State Lease No. 1367, in Louisiana state waters; (2) that Claimant was injured in the course of his employment with Herb's Welding, hereafter Employer, who was insured by United States Fidelity and Guaranty, hereafter Carrier, and was paid temporary total disability, permanent partial disability and medical expenses incident thereto; (3) that Claimant' average weekly wage at the time of injury was $282.75; and for purposes of this hearing only, Claimant had suffered a ten (10) percent permanent partial impairment to the leg.

In addition, it was found and determined at the original hearing that Claimant had suffered and was paid benefits for a temporary total disability from July 11, 1975, to December 31, 1975, in the amount of $1,300.00; was paid the sum of $17.50 per week, the minimum under Louisiana Law for a ten (10) percent permanent partial disability to the leg, for 107 weeks, in the amount of $1,872.50, making a total of $3,172.50; and the sum of $1,696.14 was paid for medical expenses. The only issue unresolved was whether this claim comes within the provisions of the Act.

To confirm these basic facts and extend them to cover the "benefits" according to the provisions of the Act (33 U.S.C., Section 901, et seq.), Counsel for Employer-

Carrier submitted a Brief, restating the average weekly wage to be $282.75, providing a compensation rate of $188.50, and that it had been "stipulated that if the Claimant were found to be entitled to benefits, they would be based on a 10% permanent partial impairment to the leg." (For reasons hereinafter set out, I find that Claimant is entitled to "benefits"). The Brief further submitted that since the loss of a leg provides for the payment of benefits for 288 weeks (under LWHCA), a 10% permanent partial impairment to the leg would require payments for 28.8 weeks. The sum of $188.50 per week for 28.8 weeks amounts to $5,428.80, and "if the Claimant was entitled to benefits (which I have found), temporary total disability benefits would be due for a period of 25 weeks from July 11, 1975, to December 31, 1975, or $14,712.50."

When the amount of temporary total disability benefits ($4,712.50) are added to the permanent partial disability benefits ($5,428.80), the total is $10,141.30. The record shows that the Claimant has already been paid a total of $3,172.50 in weekly compensation benefits under the Louisiana Workmen's Compensation Act (ORP, page 15, lines 11-23), and when that sum is subtracted from the total of $10,141.30, the difference equals $6,968.80.

It is submitted that $6,968.80 is the proper figure to be awarded to the Claimant under the ruling of the Benefits Review Board.

As stated above, insofar as the parties are concerned, the foregoing submission of facts, as extended, are sufficient to meet the terms of *Gray v. Herb's Welding, et al, supra*, and I accept them subject only to any penalties and interest as may be required by law. Also, as stated above, "the only issue unresolved was whether this claim comes

with the provisions of the Act."

Based upon the stipulated facts set out above and other facts identified by the Board on appeal, particularly "that Claimant's employment activity was situated wholly within the territorial waters of the State of Louisiana," I mistakenly concluded that "the claim did not come within the provisions of the Act, and that Claimant had been properly compensated under state workmen's compensation law."

On appeal and after a discussion of the contentions of the parties, the Board stated:

We agree with Claimant that he is not precluded from coverage by the OCSLA simply because he was injured in state territorial waters and that the "strict locality" test urged by Employer is not mandated by the OCSLA. We also find coverage. However, our ruling is based upon a rationale different from that proferred by Claimant. (Footnote omitted).

After a discussion of the Lands Act, 43 U.S.C., Section 1331, et seq., and certain evidence adduced of record, the Board concluded:

Accordingly, to establish coverage one must prove a disability or death resulting from any injury *occurring as a result* of operations conducted on the outer Continental Shelf for the purpose of exploring for, developing, removing or transporting by pipeline the natural resources of the subsoil and seabed of the outer Continental Shelf.

Insofar as Claimant's employment as a maintenance welder is integrally related to the operations enumerated in

Section 1333 of the OCSLA, and insofar as his injury was incurred as a result of such activity, we hold that Claimant has established coverage under the Act.

Accordingly, we reverse the decision below, and remand for further proceedings in accordance with this determination.

Therefore, in compliance with the findings and determinations of the Benefits Review Board and the facts set out above, I find and conclude that this claim comes within the provisions of the Act, 33 U.S.C., Section 901, et seq., as extended by 43 U.S.C., Section 1331, et seq., and Claimant should be compensated accordingly.

ORDER

It is therefore Ordered:

1. That Claimant, Robert H. Gray, Jr., is hereby found to have sustained an industrial injury to a leg on July 11, 1975, and as a result thereof suffered a temporary total disability from July 11, 1975, to December 31, 1975, and thereafter he suffered a ten (10%) percent permanent partial disability to his leg, and

2. That Employer-Carrier paid Claimant compensation benefits for the time and in the amounts set out hereinabove; and

3. That Employer-Carrier shall pay to Claimant compensation benefits based upon his average weekly wage of $282.75 for a temporary total disability from July 11, 1975, to December 31, 1975, and thereafter it shall pay Claimant for a ten (10%) permanent partial disability for 288 weeks,

taking credit for all sums actually paid as compensation benefits under the laws of the State of Louisiana, said payments to the calculated and paid for the respective periods of disability, and paid in a lump sum, together with an amount equal to ten (10) percentum of the amount due and owing, plus interest at the rate of six (6) percent per annum from the date each separate amount became due and owing until paid in full, as provided by Section 14(e) of the Act (33 U.S.C., Section 914(e); and

4. Employer-Carrier shall pay all medical expenses accrued or to accrue as provided by Section 7 of the Act (33 U.S.C., Section 907), taking credit for all medical expenses heretofore paid; and

5. That an attorney's fee will be considered and acted upon when and if an application therefor is filed in accord with the Act and the regulations within ten (10) days from service of this Order, within five (5) days allowed to opposing Counsel to consider and act thereon.

/S/BEN H. WALLEY
BEN H. WALLEY
Administrative Law Judge

Dated: 16 March 1981
New Orleans, Louisiana

APPENDIX "G"

BENEFITS REVIEW BOARD
U.S. DEPARTMENT OF LABOR

No. 81-643

ROBERT H. GRAY
Claimant-Respondent

v.

HERB'S WELDING
and
U.S. FIDELITY AND GUARANTEE
Employer/Carrier-Petitoners

Filed As Part Of The Record
April 8, 1982

Clerk
Benefits Review Board

(Not Published)

DECISION AND ORDER

Appeal from the Decision and Order on Remand of Ben H. Walley, Administrative Law Judge, U.S. Department of Labor.

James J. Brady (Gravel, Robertson and Brady), Alexandria, Louisiana, for the claimant.

John F. Simon (Gold, Little, Simon, Weems and Bruser), Alexandria, Louisiana, for the employer/carrier.

Before: RAMSEY, Chief Administrative Appeals Judge, MILLER and KALARIS, Administrative

Appeals Judges.

KALARIS, Administrative Appeals Judge:

This is an appeal by employer/carrier from a decision and Order on Remand (77-LHCA-1308R) of Administrative Law Judge Ben H. Walley, pursuant to the provisions of the Longshoremen's and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (hereinafter, LHWCA), as extended by the Outer Continental Shelf Lands Act (hereinafter, OCSLA), 43 U.S.C. §1331 *et seq.*

This is the second time this case has been considered by the Board. The facts are adequately discussed in the first decision, *Gray v. Herb's Welding,* 12 BRBS 752 (1980), wherein we reversed the determination of the administrative law judge and held that the claim was within the coverage of the OCSLA. The case was remanded to the administrative law judge for further proceedings including entry of an award if appropriate.

Employer/Carrier filed an appeal of the Board's decision with the United States Court of Appeals for the Fifth Circuit. That appeal was dismissed without prejudice by the court because the Board's decision was not a final order. *Herb's Welding v. Gray,* No. 80-3569 (5th Cir. Sept. 22, 1980) (Order).

On remand, the administrative law judge accepted the stipulations of the parties, determined that the claimant suffered a 10 percent loss of use of the leg as a result of the employment injury and awarded benefits based on an average weekly wage of $282.75. 33 U.S.C. §908(c)(2) and §908(c)(19).

Employer/carrier has appealed from this decision on remand, arguing that the Board's first decision of this case is erroneous. Specifically, employer/carrier argues that the Board's decision was based on factual conclusions which were not supported by the evidence and which were in opposition to factual findings made by the administrative law judge. It also argues that the Board erred in the legal conclusion that claimant's injury occurred "as a result of operations" conducted on the outer Continental Shelf. 43 U.S.C. §1333(b) and (c).

With regard to employer/carrier's substantive arguments on appeal, we note that these arguments raise the same issue which was decided by this Board in its first decision. *See Gray v. Herb's Welding*, 12 BRBS 752 (1980). This decision constitutes the law of the case and thus governs our determination herein. *See United States v. United States Smelting, Refining & Mining Co.*, 339 U.S. 186, *reh. denied*, 339 U.S. 972 (1950); *McNeil v. Prolerized New England Co.*, 11 BRBS 576 (1979), *aff'd sub nom. Prolerized New England Co. v. Benefits Review Board*, 637 F.2d 30, 12 BRBS 808 (1st Cir. 1980).

Accordingly, we adhere to the Board's prior detrmination that claimant is covered by the OCSLA. The administrative law judge's Decision and Order on Remand is affirmed.

SO ORDERED

/S/ISMENE M. KALARIS
ISMENE M. KALARIS
Administrative Appeals Judge

I Concur:

/S/JULIUS MILLER
JULIUS MILLER
Administrative Appeals Judge

RAMSEY, Chief Administrative Appeals Judge, concurring:

I agree with the majority that the Board's decision in this matter is controlled by the principle of the law of the case. However, I did not participate in the Board's original decision of this case, and by concurring in this second decision I do not express an opinion as to the coverage issue determination previously made by the Board.

/S/ROBERT L. RAMSEY
ROBERT L. RAMSEY, Chief
Administrative Appeals Judge

Dated this 8th day
of April 1982

Office - Supreme Court, U.S.
FILED
NOV 14 1983
ALEXANDER L. STEVAS,
CLERK

NO. 83-728

In the Supreme Court of the United States

OCTOBER TERM, 1983

HERB'S WELDING, INC. and
UNITED STATES FIDELITY & GUARANTY CO.

Petitioner

VERSUS

ROBERT H. GRAY

Respondent

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

CHRISTOPHER TOMPKINS
of
DEUTSCH, KERRIGAN & STILES
4700 One Shell Square
New Orleans, Louisiana 70139
Telephone: 504/581-5141
Attorneys for Amicus Curiae
Kerr-McGee Corporation

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

BEST AVAILABLE COPY

QUESTIONS PRESENTED FOR REVIEW

(1) Whether it is proper for the Court of Appeals to extend the landward coverage of the Longshoremen's and Harbor Workers' Compensation Act to areas not specifically included in the Act or its amendments, in the absence of an expression of congressional intent to include such areas.

(2) Whether it is proper for the Court of Appeals to extend the coverage of the amended Longshoremen's and Harbor Workers' Compensation Act to a classification of workers or to an occupation not specifically included in the Act or its amendments.

(3) Whether it is proper for the Court of Appeals to extend the coverage of the amended Longshoremen's and Harbor Workers' Compensation Act to a non-maritime worker doing repair work on a fixed platform not owned or operated by that worker's employer and located in state waters.

INTEREST OF KERR-McGEE CORPORATION

Kerr-McGee Corporation is the owner and operator of numerous stationary drilling and production platforms offshore Louisiana and Texas. These platforms are over the Continental Shelf or in Louisiana territorial waters. Kerr-McGee employs about 350 workers on these platforms, of which number roughly 50% are working on one or another of these platforms on any given day. In addition to its own employees, there may be something in the vicinity of 200 contract workers on these platforms daily.

Until now, Kerr-McGee has consistently compensated its employees or their dependents, in the event of disability or death occurring on a platform located in Louisiana's waters, in accordance with the compensation laws of that state. The decision of the Court of Appeals in the case at bar has confused a heretofore clear mandate and brings uncertainty into Kerr-McGee's offshore compensation program.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
INTEREST OF AMICUS CURIAE	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
CONSENT OF PARTIES	1
SUMMARY OF ARGUMENT	1
REASONS FOR GRANTING WRIT	2
CONCLUSION	5
CERTIFICATE OF SERVICE	6

TABLE OF AUTHORITIES

Cases: **Page**

Director, Office of Workers' Compensation Programs, v. Perini North River Associates, __ U.S. __, 103 S.Ct. 634 (1983) 5

Herb's Welding v. Gray, 703 F.2d 176 (5th Cir. 1983) 2, 3, 4

Pippen v. Shell Oil Company, 661 F.2d 378 (5th Cir. 1981) 4

Rodrigue v. Aetna Casualty & Surety Co., 395 U.S. 352, 89 S.Ct. 1835 (1969) 3, 4

Weyerhaeuser Co. v. Gilmore, 528 F.2d 957 (9th Cir. 1975), *cert. den.*, 429 U.S. 868 (1976) 5

Statutes:

33 U.S.C. 902(3) 5

33 U.S.C. 903(a) 3

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

HERB'S WELDING, INC. and
UNITED STATES FIDELITY & GUARANTY CO.

Petitioner

VERSUS

ROBERT H. GRAY

Respondent

BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

CONSENT

The brief is filed with the written consent of all parties hereto, these consents being on file with the Clerk of this Court.

SUMMARY OF ARGUMENT

The Fifth Circuit's decision in this case below broke significant new ground by extending "situs" coverage of the Longshoremen's and Harbor Workers' Compensation Act (LHWCA) to fixed offshore drilling platforms, classified by this Court as artificial islands and not included expressly or inferentially in the structures to which

Congress extended such coverage in 1972, and by extending the Act's "status" coverage to non-maritime workers, not in the platform owner's employ, who do ordinary oil and gas work on such platforms.

REASONS FOR GRANTING THE WRIT

This case offers this Court an excellent opportunity to extend its series of decisions delineating (1) the legal rules governing offshore oil and gas drilling operations and platforms, and (2) the construction of the Longshoremen's and Harbor Workers' Compensation Act as amended in 1972.

A decision by this Court in this case would definitely settle the novel and important question of LHWCA coverage of non-maritime oil and gas workers on offshore drilling or production platforms, more particularly workers not in the platform-owner's employ. At present there are many such platforms in state waters off the shores of Louisiana, Texas and California in two judicial circuits, the Fifth and the Ninth. Many non-maritime workers work on those platforms, and many of them or their dependents may become candidates for compensation in the course of such work each year.

In this case, the employer, "Herb's Welding, (is) a company which provides welding services to oil field rigs" *Herb's Welding v. Gray*, 703 F.2d 176, 177. There is nothing inherently maritime about its business.

The employee, "Gray, a welder with Herb's Welding, was assigned to ... (an) oil and gas field which is located both in Louisiana territorial waters and over the Outer Continental Shelf" *Ibid.* He "was welding a ... gas line on

a platform in the navigable waters of Louisiana when an explosion occurred. Gray, in trying to run from the area, twisted his knee." *Ibid.*

To sustain LHWCA coverage, the Fifth Circuit first analogized fixed drilling platforms to wharves, to which LHWCA coverage was extended by the 1972 amendments. In so doing it first stated, debatably, that in *Rodrigue v. Aetna Casualty & Surety Co.*, 395 U.S. 352 (1969), "Justice White...likened them (platforms) to wharves located above navigable waters." 703 F.2d at 177.

What Justice White's opinion for this Court in *Rodrigue* in fact did was to hold that fixed offshore drilling platforms are artificial islands, and that accidents thereon (before the 1972 LHWCA amendments) "would be no more under maritime jurisdiction than accidents on a wharf above navigable waters." 395 U.S. at 366.

The Fifth Circuit then said, equally debatably, that fixed platforms are in effect wharves for LHWCA purposes because they "are essential to and customarily used in the loading and unloading of crews, supplies and oil (and) their function is precisely that of wharves". 703 F.2d at 178.

It is something of a judicial leap to classify an entire artificial island used to drill wells to produce oil and gas as a wharf merely because crews, supplies and oil are incidentally loaded thereon and unloaded therefrom, especially since, in extending LHWCA coverage to "any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used *by an employer* (emphasis added) in loading, unloading, repairing or building a vessel",[1] Congress made no mention of

[1] 33 U.S.C. §903(a).

drilling platforms.

The Fifth Circuit also did not address the fact that the platform probably was not used for loading and unloading by Gray's employer, Herb's Welding, but by the platform's owner (Chevron). Many services on offshore platforms are rendered by non-maritime workers, like Gray, in the employ of non-maritime independent contractors.

Finally, having resolved to its satisfaction the "situs" requirement for LHWCA coverage, the Fifth Circuit resolved the "status" requirement in favor of coverage of the gas-line welder, Gray, by holding, debatably, that "his work was necessary for the offshore drilling process in that gas line maintenance is vital to the drilling and removal of gas and oil", and that "offshore drilling—the discovery, recovery and sale of oil and natural gas from the sea bottom—is maritime commerce". 703 F.2d at 180.

The only authority cited for this proposition is the same court's decision in *Pippen v. Shell Oil Co.*, 661 F.2d 378, 384 (5th Cir. 1981), which, unlike this case, involved a worker on a vessel (a drilling barge), not a fixed platform or artificial island, and which held that the injured wireline operator's "work was essential to the function of the vessel". 661 F.2d at 383.

The Fifth Circuit's "status" ruling in the case at bar appears inconsistent with this Court's holding in *Rodrigue v. Aetna Casualty & Surety Co.*, 395 U.S. 352, 354, 360 (1969), that a drill pipe tester's fall from a derrick on a drilling platform "had no more connection with the ordinary stuff of admiralty than do accidents on piers". It also

seems to conflict with the holding by the Ninth Circuit—which also has offshore platform jurisdiction, that the "status" issue depends on whether the employee's activities have a "realistically significant relationship to traditional maritime activity". *Weyerhaeuser Co. v. Gilmore*, 528 F.2d 957, 961 (1975), cert. den., 429 U.S. 868.[2]

CONCLUSION

It is respectfully submitted that the legal and practical implications of these questionable holdings for the many workers so employed and for their employers in at least two of the judicial circuits warrant this Court's attention and decision.

DEUTSCH, KERRIGAN & STILES

CHRISTOPHER TOMPKINS
4700 One Shell Square
New Orleans, Louisiana 70139
Telephone: 504/581-5141

[2] In *Director v. Perini North River Associates*, Justice O'Connor noted that the Supreme Court has not tested "maritime employment" as used in 33 U.S.C. 902(3) by inquiring into the relationship the employment may or may not have to navigation or commerce. 103 S.Ct. 634, 648, note 27, and Justice Stevens, in dissent in that case, expressed concern about extending coverage to an undefined group of workers who plainly do not "load, unload, build or repair ships".

CERTIFICATE OF SERVICE

Undersigned counsel, a member of the Bar of this Court, certifies that three copies of this amicus curiae brief have been sent to each opposing counsel of record by depositing same in the United States Mail, postage prepaid this 9th day of November, 1983.

Rex E. Lee, Esq.
Solicitor General
Department of Justice
Washington, D.C. 20530

James J. Brady, Esq.
P. O. Box 1792
Alexandria, La. 71301

T. Gerald Henderson, Esq.
P. O. Box 407
Alexandria, La. 71301

Wood Brown, III, Esq.
Montgomery, Barnett, Brown & Read
1800 First National Bank of Commerce Bldg.
New Orleans, Louisiana 70112-1799

Undersigned counsel further certifies that all parties required to be served have been served.

Undersigned counsel makes this certificate for purposes of complying with Rules 28.3 and 28.5 of the Rules of this Court.

CHRISTOPHER TOMPKINS
DEUTSCH, KERRIGAN & STILES
4700 One Shell Square
New Orleans, Louisiana 70139
Telephone: 504/581-5141

Office - Supreme Court, U.S.
FILED
JAN 5 1984
ALEXANDER L. STEVAS,
CLERK

No. 83-728

In the Supreme Court of the United States

OCTOBER TERM, 1983

HERB'S WELDING, INC. AND
UNITED STATES FIDELITY & GUARANTY CO., PETITIONERS

v.

ROBERT H. GRAY, JR., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

FRANCIS X. LILLY
Deputy Solicitor

KAREN I. WARD
Associate Solicitor

ALLEN H. FELDMAN
Counsel for Appellate Litigation

STEVEN J. MANDEL
Attorney

Department of Labor
Washington, D.C. 20210

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether a worker, injured on a fixed platform in the territorial waters of the State of Louisiana while providing maintenance services for platforms located in territorial waters and on the Outer Continental Shelf, is covered under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. (& Supp. V) 901 *et seq.*

TABLE OF CONTENTS

Page

Opinions below 1

Jurisdiction 1

Statement 2

Argument 4

Conclusion 11

TABLE OF AUTHORITIES

Cases:

Boudloche v. *Howard Trucking Co.*, 632 F.2d 1346, cert. denied, 452 U.S. 915 7

Boudreaux v. *American Workover, Inc.*, 680 F.2d 1034, aff'g 664 F.2d 463, cert. denied, No. 82-605 (Jan. 24, 1983) 5, 6, 9

Brady-Hamilton Stevedore Co. v. *Herron*, 568 F.2d 137 7

Browning v. *B.F. Diamond Construction Co.*, 676 F.2d 547, cert. denied, No. 82-4 (Jan. 24, 1983) 7

Chevron Oil Co. v. *Huson*, 404 U.S. 97 ..... 5, 8

Director, OWCP v. *Perini North River Associates*, No. 81-897 (Jan. 11, 1963) 4, 6

Fusco v. *Perini North River Associates*, 622 F.2d 1111, cert. denied, 449 U.S. 1131 5

Garvey Grain Co. v. *Director, OWCP*, 639 F.2d 366 7

Graziano v. *General Dynamics Corp.*, 663 F.2d 340 ..... 6, 7

Page

Cases—Continued:

Higginbotham v. *Mobil Oil Corp.*, 545 F.2d 422, rev'd on other grounds, 436 U.S. 618 11

Hullinghorst Industries, Inc. v. *Carroll*, 650 F.2d 750, cert. denied, 454 U.S. 1163 ..... 5, 6, 7

Nalco Chemical Corp. v. *Shea*, 419 F.2d 572 7

Nations v. *Morris*, 483 F.2d 577, cert. denied, 414 U.S. 1071 11

Newport News Shipbuilding & Dry Dock Co. v. *Graham*, 573 F.2d 167, cert. denied, 439 U.S. 979 7

Northeast Marine Terminal Co. v. *Caputo*, 432 U.S. 249 ..... 4, 7, 10

Odom Const. Co. v. *Department of Labor*, 622 F.2d 110, cert. denied, 450 U.S. 966 ..... 5, 6

P.C. Pfeiffer Co. v. *Ford*, 444 U.s. 69 6

Pippen v. *Shell Oil Co.*, 661 F.2d 378 ..... 6, 10

Price v. *Norfolk & Western Ry.*, 618 F.2d 1059 6-7

Prolerized New England Co. v. *Benefits Review Board*, 637 F.2d 30, cert. denied, 452 U.S. 938 6

Rodrigue v. *Aetna Casualty & Surety Co.*, 395 U.S. 352 ..... 4-5, 8

Schwabenland v. *Sanger Boats*, 683 F.2d 309, cert. denied, No. 82-523 (Jan. 24, 1983) 7

Page

Cases—Continued:

Stansbury v. *Sikorski Aircraft*, 681 F.2d 948, cert. denied, No. 82-824 (Dec. 13, 1982) ... 10-11

Stockman v. *John T. Clark & Son of Boston, Inc.*, 539 F.2d 264, cert. denied, 433 U.S. 908 7

Thornton v. *Brown & Root, Inc.*, 707 F.2d 149, petition for cert. pending, No. 83-243 6

Trotti & Thompson v. *Crawford*, 631 F.2d 1214 6

Victory Carriers, Inc. v. *Law*, 404 U.s. 202 10

Ward v. *Director, OWCP*, 684 F.2d 1114, cert. denied, No. 82-566 (Jan. 24, 1983) 7

Statutes:

Jones Act, 46 U.S.C. 688 9

Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. (& Supp. V) 901 *et seq.* 2

Section 2(3), 33 U.S.C. 902(3) .. 2, 3, 5, 6, 7, 8
Section 3(a), 33 U.S.C. 903(a) 4, 8
Section 21(b), 33 U.S.C. (& Supp V) 921(b) 3
Section 21(c), 33 U.S.C. 921(c) 3

Outer Continental Shelf Lands Act, 43 U.S.C. (& Supp. V) 1331 *et seq.*:

43 U.S.C. (Supp. V) 1333(a)(1) 8
43 U.S.C. (Supp. V) 1333(a)(2) 8
43 U.S.C. (Supp. V) 1333(b) 3, 10, 11

Page

Miscellaneous:

Marine Petroleum Workers' Compensation Act, S. 1547, 92d Cong., 1st Sess. (1971) (the Tower bill), *reprinted in Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972: Hearings on S. 2318, S. 525 and S. 1547 Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare*, 92d Cong., 2d Sess. (1972) 9

In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-728

HERB'S WELDING, INC. AND
UNITED STATES FIDELITY & GUARANTY CO., PETITIONERS

v.

ROBERT H. GRAY, JR., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A9) is reported at 703 F.2d 176. The opinion of the court of appeals denying rehearing (Pet. App. A10-A13) is reported at 711 F.2d 666. The order of the court of appeals dismissing the initial petition for review (Pet. App. A38) is not reported. The decision and order of the Benefits Review Board (Pet. App. A19-A37) is reported at 12 Ben. Rev. Bd. Serv. (MB) 752. The decision and order of the Benefits Review Board (Pet. App. A46-A49) following remand is not reported. The decision and orders of the administrative law judge (Pet. App. A14-A18, A39-A45) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on April 18, 1983, and a petition for rehearing was denied on August 8, 1983. The petition for a writ of certiorari was filed

on October 14, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Respondent Robert H. Gray was employed by petitioner Herb's Welding, Inc., a company that provides welding services to oil field rigs (Pet. App. A2). Gray was assigned to the Bay Marchand marine oil and gas field, which extends beyond Louisiana territorial waters to the Outer Continental Shelf (*ibid.*). His duties included repairing and maintaining oil and gas lines, as well as the fixed platform production structures from which the lines ran (*ibid.*). While on duty Gray lived, ate and slept on a platform situated in Louisiana waters, and worked on platforms located throughout the field, in both Louisiana and Outer Continental Shelf waters (*ibid.*).[1] He was transported to his daily work sites by boat or helicopter (*ibid.*). On the day of his injury, Gray was assigned to a platform in the navigable waters of Louisiana (*ibid.*).[2] While Gray was welding a gas line, an explosion occurred; in trying to run from the area, he sustained a knee injury (*ibid.*).

2. Gray filed a claim for compensation under the Longshoremen's and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. (& Supp. V) 901 *et seq.* (Pet. App. A15). Gray's employer and its insurance carrier, petitioner United States Fidelity & Guaranty Co., disputed the claim. After a hearing an administrative law judge determined that Gray was not entitled to LHWCA benefits because he was not "engaged in maritime employment" within the meaning of Section 2(3) of the Act, 33 U.S.C. 902(3) (Pet. App. A14-A18).

---

[1]Gray estimated that approximately 25% of his time was spent on the Outer Continental Shelf (Pet. App. A26).

[2]The platform on which Gray was injured was fed by a gas flow line that extended out to the Outer Continental Shelf (Pet. App. A26).

Gray appealed to the Benefits Review Board pursuant to 33 U.S.C. (& Supp. V) 921(b), arguing both that he had been "engaged in maritime employment" within the meaning of Section 2(3) of the LHWCA and that, in any event, he was entitled to LHWCA benefits by virtue of the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. (Supp. V) 1333(b).[3] In a divided decision, the Board ruled that Gray was covered under the OCSLA and, as a result, was entitled to LHWCA benefits (Pet. App. A26). The Board reasoned that the OCSLA applied because Gray's employment as a welder was "integrally related to the operations enumerated in Section 1333 of the OCSLA" and "his injury was incurred as a result of such activity" (Pet. App. A26). The Board's dissenting member concluded that the OCSLA was not applicable because, although Gray performed 25% of his work on the Outer Continental Shelf, he was injured while on territorial waters (Pet. App. A27-A37).

3. Petitioners sought judicial review of the Board's decision under 33 U.S.C. 921(c). The court of appeals affirmed without addressing the analysis of the Board. The court determined that Gray was covered under the LHWCA itself; thus, it did not reach the issue of coverage under the OCSLA (Pet. App. A3).

The court decided, as a threshold issue, that "the LHWCA can reach an offshore oil field worker injured upon a fixed platform located in Louisiana waters" (Pet.

---

[3]43 U.S.C. (Supp. V) 1333(b) provides that:

> With respect to disability or death of an employee resulting from any injury occurring as the result of operations conducted on the Outer Continental Shelf for the purpose of exploring for, developing, removing or transporting by pipeline the natural resources, or involving rights to the natural resources, of the subsoil and seabed of the Outer Continental Shelf, compensation shall be payable under the provisions of the Longshoremen's and Harbor Workers' Compensation Act.

App. A3). The court then concluded that the LHWCA's situs and status tests for coverage were met in this case. The situs of the injury was within the "expanded shoreside coverage of the Act" (*id.* at A7), because the platform upon which Gray was injured is "essential to and customarily used in the loading and unloading of crews, supplies and oil. [Its] function is precisely that of wharves over navigable waters" (*id.* at A4). The status test was also satisfied because Gray's duties were "a central part" of the offshore drilling process, and offshore drilling is "maritime commerce" (*id.* at A8-A9).

ARGUMENT

The court of appeals correctly applied well-established principles regarding coverage under the Longshoremen's and Harbor Workers' Compensation Act to the particular facts of this case. The court's conclusion that Gray's injury occurred upon a covered situs and that he was "engaged in maritime employment" does not conflict with the views of this Court or of any other court of appeals and does not warrant further review.

1. Recent decisions of this Court have established that coverage under the amended LHWCA hinges on both the situs of the injury and the status of the injured worker. *Director, OWCP* v. *Perini North River Associates*, No. 81-897 (Jan. 11, 1983), slip op. 16-17; *Northeast Marine Terminal Co.* v. *Caputo*, 432 U.S. 249, 265 (1977).

The court of appeals correctly concluded that the situs of Gray's injury—a fixed marine petroleum production platform—falls within the expanded shoreside coverage of the amended LHWCA. In 1972, Congress expanded the definition of "navigable waters" to include certain adjoining land areas, including piers and wharves. Section 3(a), 33 U.S.C. 903(a); *Director, OWCP* v. *Perini North River Associates*, slip op. 1. In *Rodrigue* v. *Aetna Casualty & Surety Co.*,

395 U.S. 352, 361, 365-366 (1969), this Court declared that fixed offshore platforms are artificial islands, and likened such structures to wharves. See also *Chevron Oil Co.* v. *Huson*, 404 U.S. 97 (1971). Indeed, as the court of appeals aptly noted, marine platforms serve the essential functions of wharves in that they are "used in the loading and unloading of crews, supplies and oil" (Pet. App. A4). Such platforms, therefore, are a covered situs for purposes of the LHWCA.[4]

The court of appeals also correctly determined that Gray satisfied the Section 2(3) status test for LHWCA coverage (33 U.S.C. 902(3)). The basic test for determining whether a worker is an employee under Section 2(3) is whether he is "engaged in maritime employment." The test uniformly employed by the courts of appeals, including the court below, in making that determination for land-based workers is whether an employee's activities have a "realistically significant relationship to traditional maritime activity" (Pet. App. A8). See, *e.g.*, *Boudreaux* v. *American Workover, Inc.*, 680 F.2d 1034, 1052 (5th Cir. 1982) (en banc), cert. denied, No. 82-605 (Jan. 24, 1983); *Fusco* v. *Perini North River Associates*, 622 F.2d 1111, 1113 (2d Cir. 1980), cert. denied, 449 U.S. 1131 (1981); *Odom Const. Co.* v. *Department of Labor*, 622 F.2d 110, 113 (5th Cir. 1980), cert. denied, 450 U.S. 966 (1981). This test accords with this Court's conclusion that "maritime employment" is not

---

[4]That the platform may not have been "used for loading and unloading by Gray's employer, Herb's Welding, but by the platform's owner (Chevron)" (Amicus Br. 4) is of no consequence. The platform was clearly utilized in maritime commerce, and Gray's activities were essential to maintaining the maritime utility of the structure. *Odom Const. Co.* v. *Department of Labor*, 622 F.2d 110, 114 (5th Cir. 1980), cert. denied, 450 U.S. 966 (1981); *Hullinghorst Industries, Inc.* v. *Carroll*, 650 F.2d 750, 757 (5th Cir. 1981), cert. denied, 454 U.S. 1163 (1982).

limited to the occupations specifically enumerated in Section 2(3). *P.C. Pfeiffer Co.* v. *Ford*, 444 U.S. 69, 77-78 n.7 (1979).[5]

The court of appeals' application of the "realistically significant relationship" test in this case is undoubtedly correct. As the court explained, "[o]ffshore drilling—the discovery, recovery and sale of oil and natural gas from the sea bottom—is maritime commerce" (Pet. App. A9). See *Boudreaux* v. *American Workover, Inc.*, 680 F.2d at 1052-1053, aff'g 664 F.2d 463, 464-466 (5th Cir. 1981); *Pippen* v. *Shell Oil Co.*, 661 F.2d 378, 384 (5th Cir. 1981). See also *Thornton* v. *Brown & Root, Inc.*, 707 F.2d 149, 153 (5th Cir. 1983), petition for cert. pending, No. 83-343. Because the maintenance of marine oil and gas lines and fixed platforms is essential to the effectuation of the offshore drilling process, it follows that such activity entails traditional maritime activity (Pet. App. A8-A9), in the same manner as does construction and repair of such landside facilities as piers and wharves.[6]

---

[5]In *Director, OWCP* v. *Perini North River Associates*, slip op. 19-21, this Court rejected application of the "significant relationship" test to employees injured on navigable waters because, in establishing the separate "situs" and "status" tests in the 1972 amendments to the LHWCA, Congress did not intend to withdraw coverage from employees "traditionally covered by the Act, who were injured in the course of their employment on navigable waters as previously defined." The Court did not discuss whether the test properly applied to workers injured on land (*id.* at 21 n.27). See Pet. App. A8.

[6]See *Hullinghorst Industries, Inc.* v. *Carroll*, 650 F.2d 750 (5th Cir. 1981), cert. denied, 454 U.S. 1163 (1982) (pier repair); *Trotti & Thompson* v. *Crawford*, 631 F.2d 1214 (5th Cir. 1980) (pier construction); *Odom Const. Co.* v. *Department of Labor*, 622 F.2d 110 (5th Cir. 1980), cert. denied, 450 U.S. 966 (1981) (maintenance of mooring block); *Graziano* v. *General Dynamics Corp.*, 663 F.2d 340 (1st Cir. 1981) (maintenance of shipyard buildings and machinery); *Prolerized New England Co.* v. *Benefits Review Board*, 637 F.2d 30 (1st Cir. 1980), cert. denied, 452 U.S. 938 (1981) (maintenance of scrap metal cargo processing machinery); *Price* v. *Norfolk & Western Ry.*, 618 F.2d 1059 (4th Cir. 1980) (maintenance of shoreside shiploading machinery); *Newport News Shipbuilding & Dry Dock Co.* v. *Graham*, 573 F.2d 167 (4th Cir.), cert. denied, 439 U.S. 979 (1978) (maintenance of shipyard machinery); *Garvey Grain Co.* v. *Director, OWCP*, 639 F.2d 366 (7th Cir. 1981) (maintenance of grain cargo processing and loading machinery).

Furthermore, the fact that Gray spent a significant amount of time traveling on the water in the course of his employment underscores his "maritime employment" status under Section 2(3). Workers traveling over or through water en route to offshore drilling platforms are performing maritime activities within the coverage of the LHWCA. *Nalco Chemical Corp.* v. *Shea*, 419 F.2d 572, 574 (5th Cir. 1969). See also *Ward* v. *Director, OWCP*, 684 F.2d 1114, 1116-1117 (5th Cir. 1982), cert. denied, No. 82-566 (Jan. 24, 1983) (fish-spotter airplane pilot, assisting fleet of fishing boats, possesses significant relationship to maritime activities). This result is not changed by the fact that Gray arguably did not spend a "substantial portion" of his time in such travel,[7] or that he was not engaged in such activity at the time he was injured.[8]

---

[7]*Northeast Marine Terminal Co.* v. *Caputo*, 432 U.S. at 273 ("when Congress said it wanted to cover 'longshoremen,' it had in mind persons whose employment is such that they spend at least some of their time in indisputably longshoring operations"). Accord, *Schwabenland* v. *Sanger Boats*, 683 F.2d 309, 312 (9th Cir. 1982), cert. denied, No. 82-523 (Jan. 24, 1983); *Graziano* v. *General Dynamics Corp.*, 663 F.2d 340, 343 (1st Cir. 1981); *Boudloche* v. *Howard Trucking Co.*, 632 F.2d 1346, 1348 (5th Cir. 1980), cert. denied, 452 U.S. 915 (1981).

[8]See, *e.g.*, *Browning* v. *B. F. Diamond Construction Co.*, 676 F.2d 547, 548-549 (11th Cir. 1982), cert. denied, No. 82-4 (Jan. 24, 1983); *Hullinghorst Industries, Inc.* v. *Carroll*, 650 F.2d 750, 754 (5th Cir. 1981), cert. denied, 454 U.S. 1163 (1982); *Brady-Hamilton Stevedore Co.* v. *Herron*, 568 F.2d 137, 140 (9th Cir. 1978); *Stockman* v. *John T. Clark & Son of Boston, Inc.*, 539 F.2d 264, 274 (1st Cir. 1976), cert. denied, 433 U.S. 908 (1977).

2. Petitioners contend (Pet. 8-12) that the court of appeals' conclusion that offshore drilling is maritime commerce conflicts with this Court's holdings in *Rodrigue* v. *Aetna Casualty & Surety Co., supra*, and *Chevron Oil Co.* v. *Huson, supra*. In *Rodrigue* and *Chevron*, the Court held that, for admiralty law purposes, fixed platforms on the Outer Continental Shelf are to be treated as islands or as federal enclaves within a landlocked state, not as vessels. See 43 U.S.C. (Supp. V) 1333(a)(1). *Rodrigue* and *Chevron*, however, do not address the application of the LHWCA to injuries in territorial waters or on the Outer Continental Shelf. The decisions, therefore, are inapposite to the status question in this case.

Rodrigue and *Chevron* were decided on the basis of principles that govern admiralty tort jurisdiction and that strictly require injury on the water.[9] The amended LHWCA no longer requires that the injury occur on actual navigable waters but, rather, contains distinct situs and status requirements of its own. Accordingly, this Court's conclusion in *Rodrigue* and *Chevron* that fixed offshore platforms are extensions of land similar to wharves aids Gray rather than petitioners: although piers and wharves are extensions of land, they nevertheless clearly meet the situs requirement of Section 3(a) of the LHWCA and are instrumentalities of maritime commerce covered by Section 2(3).

---

[9]In *Rodrigue*, this Court was asked to determine whether a wrongful death action arising out of an injury on an oil drilling platform on the Outer Continental Shelf was governed by Louisiana law or the federal Death on the High Seas Act. This Court concluded that, under the OCSLA, Louisiana law governed. See 43 U.S.C. (Supp. V) 1333(a)(2). In *Chevron*, this Court similarly determined that the Louisiana statute of limitations, as opposed to the admiralty doctrine of laches, governed an injury on an oil drilling platform on the Outer Continental Shelf under 43 U.S.C. (Supp. V) 1333(a)(2).

3. Petitioners next contend (Pet. 13-15) that Gray cannot be within the LHWCA's intended coverage because Congress rejected the inclusion of offshore oil workers within the coverage of the Act. See proposed "Marine Petroleum Workers' Compensation Act," S. 1547, 92d Cong., 1st Sess. (1971) (the Tower bill), *reprinted in Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972: Hearings on S. 2318, S. 525 and S. 1547 Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare*, 92d Cong., 2d Sess. 24-27 (1972).

The Fifth Circuit, sitting en banc in *Boudreaux* v. *American Workover, Inc.*, 680 F.2d at 1053, has correctly rejected petitioners' argument. As the *Boudreaux* court explained, the Tower bill would have extended LHWCA coverage to *all* marine petroleum extraction workers. As a result, crew members on movable oil barges, who would otherwise have been entitled to pursue compensatory damages under the Jones Act, 46 U.S.C. 688, would have been relegated to compensation remedies under the LHWCA. Moreover, at the time the Tower bill was proposed, both industry and labor agreed that other marine petroleum workers, such as those injured on navigable waters or on fixed platforms on the Outer Continental Shelf, were covered by the LHWCA. Accordingly, the only possible inference to be derived from the rejection of the Tower bill (680 F.2d 1053):

> is that Congress felt that no new legislation was required to afford LHWCA coverage to non-crew oil-workers injured on navigable waters, and that it did not wish to deprive "crew" oil-workers of their more lucrative Jones Act recovery.

Indeed, were there any question concerning Congress's clear intent to provide offshore oil workers with LHWCA coverage, it is resolved by the fact that, in the OCSLA,

Congress expressly extended LHWCA coverage to injuries occurring on the Outer Continental Shelf. 43 U.S.C. (Supp. V) 1333(b).[10] In sum, congressional action with respect to offshore oil workers is consistent with the court of appeals' conclusion that the marine drilling process is maritime commerce. And, given that conclusion, the court of appeals correctly determined that because Gray's duties had a significant relationship to such activity, he was covered by the LHWCA.[11]

4. Although the court of appeals did not address the issue, respondent Gray is entitled to LHWCA benefits for the additional reason that he was injured "as the result of operations conducted on the outer Continental Shelf for the purpose of exploring for, developing, removing, or transporting by pipeline the natural resources * * * of the subsoil and seabed of the outer Continental Shelf." 43 U.S.C. (Supp. V) 1333(b). The OCSLA automatically extends the coverage of the LHWCA to provide compensation for such injuries. *Ibid.*; *Pippen* v. *Shell Oil Co.*, 661 F.2d at 382 n.5. "[T]here is no need for an employee to whom OCSLA applies to satisfy independently the two-fold situs and status test for LHWCA coverage." *Stansbury* v. *Sikorski*

---

[10]Contrary to petitioners' suggestion (Pet. 15 n.14), it would make little sense for this Court to conclude that, although Congress specifically provided LHWCA coverage of marine petroleum workers working on the Outer Continental Shelf, it excluded from coverage like employees working in territorial waters. Rather than giving effect to congressional intent, such a holding would reintroduce the "checkered" LHWCA coverage that the 1972 amendments to the Act were designed to eliminate. See generally *Northeast Marine Terminal Co.* v. *Caputo*, *supra*.

[11]*Victory Carriers, Inc.* v. *Law*, 404 U.S. 202 (1971), relied upon by petitioners (Pet. 17), is inapposite. That case involved injuries sustained on a wharf before the shoreside coverage of the LHWCA was extended to such locales in 1972.

Aircraft, 681 F.2d 948, 951 (5th Cir. 1982), cert. denied, No. 82-824 (Dec. 13, 1982) (citation omitted).[12]

Despite the fact that Gray's injury occurred in Louisiana territorial waters, his employment was "integrally related" to marine petroleum activities on the Outer Continental Shelf, and his injury was incurred as a result of such activities (Pet. App. A26). Having thus met the test provided in 43 U.S.C. (Supp. V) 1333(b), Gray was entitled to LHWCA benefits. See *Stansbury* v. *Sikorski Aircraft, supra.*

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

FRANCIS X. LILLY
Deputy Solicitor

KAREN I. WARD
Associate Solicitor

ALLEN H. FELDMAN
Counsel for Appellate Litigation

STEVEN J. MANDEL
Attorney
Department of Labor

JANUARY 1984

---

[12]The OCSLA imposes no situs-of-injury requirement. *Stansbury* v. *Sikorski Aircraft*, 681 F.2d 950, 951 n.2. See also *Higginbotham* v. *Mobil Oil Corp.*, 545 F.2d 422, 432 & n.11 (5th Cir. 1977) (injuries sustained while on the Outer Continental Shelf, but off a platform, are covered), reversed on other grounds, 436 U.S. 618 (1978); *Nations* v. *Morris*, 483 F.2d 577, 584 (5th Cir.), cert. denied, 414 U.S. 1071 (1973) (same).

DOJ-1984-01

Office - Supreme Court, U.S.
FILED
JAN 13 1983
ALEXANDER L. STEVAS,
CLERK

NO. 83-728

In the Supreme Court of the United States

OCTOBER TERM, 1983

HERB'S WELDING, INC. and
UNITED STATES FIDELITY & GUARANTY CO.

Petitioner

VERSUS

ROBERT H. GRAY

Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

REPLY BRIEF OF PETITIONERS

WOOD BROWN III
MONTGOMERY, BARNETT,
BROWN & READ
1800 FIRST NATIONAL BANK
OF COMMERCE BUILDING
NEW ORLEANS, LOUISIANA 70112
TELEPHONE (504) 561-8989

ATTORNEYS FOR PETITIONER

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

TABLE OF AUTHORITIES

CASES	PAGE
Boudreaux v. American Workover, Inc., 680 F.2d 1034 (5th Cir. 1982)	3
Chevron Oil Co. v. Huson, 404 U.S. 97, 92 S.Ct. 349 (1971)	2
Director v. Perini North River Associates, __ U.S. __, 103 S.Ct. 634 (1983)	3
Rodrigue v. Aetna Cas. & Sur. Co., 395 U.S. 352, 89 S.Ct. 1835 (1969)	2
Victory Carriers v. Law, 404 U.S. 202, 92 S.Ct. 418 (1971)	4

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

HERB'S WELDING, INC. and
UNITED STATES FIDELITY & GUARANTY CO.

Petitioner

VERSUS

ROBERT H. GRAY

Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

REPLY BRIEF OF PETITIONERS
(RULE 22.5)

MAY IT PLEASE THE COURT:

The seminal or "bottom line" question posed in this application is whether mineral extractive operations conducted on fixed platforms constitute "maritime employment" as that term is used in the Longshoremen & Harbor Workers Compensation Act. The dispute is cleanly focused by Arguments Numbers 1 and 2 of the brief in opposition in this case. Stated differently, while both "situs" and "status" are at issue here, a resolution of "status" will compel the decision on situs.

This is so because, if mineral extractive operations

are "maritime employment" then the platforms where they are conducted can arguably be a "covered situs" under the LHWCA and our contentions in the original application and the "reasons" in support of this do not contravene this. The cases cited by the authors of the brief in opposition in footnote 6 page 6 generally support this proposition.

On this point, however, it is interesting to note that there is no serious argument in the brief in opposition about whether or not mineral extractive operations constitute "maritime employment". It seems to be accepted that this is so because the Fifth Circuit has held it to be so, and the argument simply proceeds from that conclusion without any real analysis supporting the correctness of this obviously flawed premise.

The fact that mineral extractive operations are not "maritime employment" is established by this Court's decision in *Rodrigue v. Aetna Cas. & Sur. Co.*, 395 U.S. 352, 89 S.Ct. 1835 (1969) and supported by the decision in *Chevron Oil Co. v. Huson*, 404 U.S. 97, 92 S.Ct. 349 (1971). Rather than dispute the analysis of those decisions, the brief in opposition contents itself with affixing a label of "inapposite" on them. It does this because these decisions involved accidents on the outer continental shelf rather than accidents in territorial waters. However, in the context of the decision and what it is cited for here, that factor makes no difference. The nature of the activities of the particular workmen is what we are driving at, not the geographical location of the accidents.

In *Rodrigue* and *Huson*, had the conclusion of this Court been that the mineral extractive operations they were engaged in were "maritime" in nature, the result of those cases would have been markedly different. The fact

is that the same general sort of work which Robert Gray, plaintiff here, was performing was held by this Court to be non-maritime in nature and the whole fabric of the decisions follows from that holding, as well as a long line of jurisprudence following thereafter.

If those activities were non-maritime in that case, what justification is there for holding that they are maritime in this case? The Brief in Opposition does not say. The opinion of the Court below does not say. And the reason they do not say is that there is no justification for the holding.

The rationale and focus of this case is pointed up in the second paragraph of Argument No. 2 on page 6 of the brief in opposition. The point is made there that *Rodrigue* and *Huson* support Gray, not petitioners because of the likening of wharves to platforms. This would be so if, in fact, mineral extractive operations constituted "maritime employment" which, as pointed out above, is the underlying issue in the case, and which is something which is not addressed by the brief in opposition.

Argument No. 3 in the brief in opposition misperceives the effect of the Tower bill (S.1547, 92nd Cong.) and misperceives the effect of the action of the Fifth Circuit in *Boudreaux v. American Workover, Inc.*, 680 F.2d 1034 (5th Cir. 1982) wherein it "correctly rejected petitioner's argument." One of the bases of the Fifth Circuit's decision in *Boudreaux* was that there was no "roll-back" of coverage under the LHWCA, something that this Court ultimately settled in *Director v. Perini North River Associates*, __ U.S. __, 103 S.Ct. 634 (1983). It was in the context of that resolution that the comments attributed to the Fifth Circuit were made. The comments have no

application to the dispute here because there was no coverage under the LHWCA of platform workers on inshore platforms prior to 1972. Put another way, Boudreaux would have been covered by the LHWCA prior to 1972, Gray would not have been.

The point we made originally is as valid now. Gray, and workmen like him were not covered when the Tower bill was being considered. Congress likely was aware of the effect of this Court's decisions in *Rodrigue* and *Huson* concerning the non-maritime nature of mineral extractive work. The Tower bill would have covered Gray and other workers like him as well as crew members and others. Just as there is no coverage for crew members under the LHWCA because of the failure of passage of the Tower bill, there is no coverage for Gray and others like him, especially since the work they do is non-maritime as this Court has previously held.

In footnote 11, page 10 of the brief in opposition, the case of *Victory Carriers v. Law*, 404 U.S. 202, 92 S.Ct. 418 (1971) is labeled "inapposite" because the thrust of the case was somewhat different (which is true). However, the citation was for the purpose of demonstrating that this Court has not hesitated to decline to extend the coverage of the LHWCA to areas (either geographical or activity related) not mentioned by Congress, despite the "checkered" effect decried in Footnote 10. The point is that in *Law*, there was no coverage for landside longshoremen because Congress had not ordained it despite the fact that shipside longshoremen were covered. The same reasoning is applicable here. Congress has ordained coverage for mineral extractive workmen on the outer continental shelf regardless of what they are doing or where they are doing it as long as it is on the shelf.

By the same token as the longshoremen in *Law*, there is no coverage here for Gray because Congress has not ordained it, even to the point of failing to pass a bill which would have provided coverage. This lack of coverage exists even though the workmen on the outer continental shelf would be covered.

These factors considered, the opinion and reasoning of this Court in *Law* is not deserving of the label affixed to it by the brief in opposition and the lack of response to the argument otherwise is noteworthy.

Finally, we note that the brief in opposition, in its argument number 4 introduces an issue which is not before the Court, either in the questions we presented for review or the questions that the brief in opposition presented (see page [I]). It is an issue which was decided by the Benefits Review Board, but which was ignored and not even commented upon by the Fifth Circuit, probably because it is so lacking in merit. Under the circumstances, it should not have been placed before this Court in an offhanded manner.

CONCLUSION

We respectfully suggest that the application should be granted by the Court.

RESPECTFULLY SUBMITTED

WOOD BROWN III
MONTGOMERY, BARNETT,
BROWN & READ

CERTIFICATE OF SERVICE

Undersigned counsel, a member of the Bar of this Court, certifies that three copies of this petition and all related documentation has been mailed to each opposing counsel as follows:

Joshua S. Gillelan, II, Esq.
Office of the Solicitor of Labor
U.S. Department of Labor
Suite N2620 - NDOL
Washington, D. C. 20210

James J. Brady, Esq.
P.O. Box 1792
Alexandria, La. 71301

T. Gerald Henderson, Esq.
P.O. Box 407
Alexandria, La. 71301

Undersigned counsel makes this certificate for purposes of complying with Rule 28.3 and 28.5 of the Rules of this Court.

_____

Wood Brown III

Office - Supreme Court, U.S.
FILED
MAY 8 1984
L. STEVAS
CLERK

NO. 83-728

In the Supreme Court of the United States

OCTOBER TERM, 1983

HERB'S WELDING, INC. and
UNITED STATES FIDELITY & GUARANTY CO.

Petitioner

VERSUS

ROBERT H. GRAY

Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

ORIGINAL BRIEF ON THE MERITS ON BEHALF OF HERB'S WELDING, INC. AND GUARANTY CO., PETITIONERS HEREIN

WOOD BROWN III
MONTGOMERY, BARNETT,
BROWN & READ
1800 FIRST NATIONAL BANK
OF COMMERCE BUILDING
NEW ORLEANS, LOUISIANA 70112
TELEPHONE (504) 561-8989

ATTORNEYS FOR PETITIONER

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

26pp

BEST AVAILABLE COPY

QUESTIONS PRESENTED

(1) Whether a welder working on a fixed platform in Louisiana territorial waters is covered under the Longshoremen & Harbor Workers Compensation Act (33 U.S.C. §§901, et seq., particularly §§902(3) and 903.)

(2) Whether workmen engaged in support activities (such as welding) in connection with mineral extractive activities are engaged in "maritime employment" (33 U.S.C. §902[3]).

(3) Whether workmen on fixed platforms in Louisiana territorial waters are working in a covered situs as required by 33 U.S.C. §903.

(4) Whether oil field labor, such as welding, is "maritime employment" as that term is contemplated in the Longshoremen & Harbor Workers Compensation Act, 33 U.S.C. §902[3].

PARTIES TO THE PROCEEDING

The parties to the proceeding are listed below:

Robert H. Gray
Herb's Welding, Inc.
United States Fidelity & Guaranty Co.
Director, Office of Workmens Compensation Programs, United States Department of Labor.

Pursuant to Rule 28.1 of the Rules of this Court, undersigned counsel certifies to the Court that, after diligent investigation, he is advised that the United States Fidelity & Guaranty Co. has no parent companies, affiliates or subsidiaries as those terms are used in said rule. Undersigned counsel further certifies that Herb's Welding, Inc. is no longer in existence, however, based on personal knowledge, it had no parent companies, affiliates or subsidiaries when it was in operation.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
PARTIES TO THE PROCEEDINGS	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	2
STATUTE INVOLVED	2
STATEMENT OF THE CASE	3
SUMMARY OF ARGUMENT	4
ARGUMENT	5
CONCLUSION—PRECISE RELIEF SOUGHT	18
CERTIFICATE OF SERVICE	20

TABLE OF AUTHORITIES

Cases: **Page**

Barnes v. Sun Oil Co.,
362 So.2d 761 (La. 1978) 13

Bible v. Chevron Oil Co.,
460 F.2d 1218 (5th Cir. 1972) 13

Boudreaux v. American Workover, Inc.,
664 F.2d 463 (5th Cir. 1981); Rehearing Granted 664 F.2d 480 (5th Cir. 1982); (5th Cir. 1982) 6, 7, 10, 11

Broussard v. Heebe's Bakery, Inc.,
263 La. 561, 268 So.2d 656 (1968) 13

Chevron Oil Co. v. Huson,
404 U.S. 97, 92 S.Ct. 349 (1971) 5, 7, 8, 9, 10, 11

Director, Office of Workmens Compensation Programs v. Perini North River Associates,
__ U.S. __, 103 S.Ct. 634 (1983) 10, 14

Dore v. Link Belt, Inc.,
391 F.2d 671 (5th Cir. 1968) 8

Gray v. Chevron Oil Co.,
631 F.2d 1263 (5th Cir. 1980); 644 F.2d 540 (5th Cir. 1981) 13

Herb's Welding, Inc. v. Gray,
703 F.2d 176 (5th Cir. 1983); Application and Suggestion for Rehearing denied, 711 F.2d 666 (5th Cir. 1983) 1, 2

Moragne v. States Marine Lines,
398 U.S. 375, 90 S.Ct. 1772 (1970) 9

North East Marine Terminals, Inc. v. Caputo,
432 U.S. 249, 97 S.Ct. 2348 (1977) 4

P. C. Pfeiffer Co., Inc. v. Ford,
444 U.S. 69, 100 S.Ct. 328 (1980) 15

Pippin v. Shell Oil Co.,
661 F.2d 378 (5th Cir. 1981) 6, 10, 11

Rodrigue v. Aetna Cas. & Sur. Co.,
395 U.S. 352, 89 S.Ct. 1835 (1969) 5, 6, 7, 8, 9, 10, 11, 12, 13, 16

Rodrigue v. Aetna Cas. & Sur. Co.,
395 F.2d 216 (5th Cir. 1968) 8

Sea-Land Services, Inc. v. Gaudet,
414 U.S. 573, 94 S.Ct. 806 (1974) 9

Sun Ship, Inc. v. Pennsylvania,
447 U.S. 715, 100 S.Ct. 2432 (1981) 13

Thornton v. Brown & Root, Inc.,
707 F.2d 149 (5th Cir. 1983) 7, 11

Victory Carriers v. Law,
404 U.S. 202, 92 S.Ct. 418 (1971) 6, 17

STATUTES

28 U.S.C. §1254(1) 2
33 U.S.C. §902(3) . . . . . i, 2, 3
33 U.S.C. §903 . . . . . i, 3, 12
33 U.S.C. §919, 921(b), 921(c) 16
43 U.S.C. §1333 . . . . . 4, 14
La. R.S. 23:1032 13

OTHER AUTHORITIES

U.S. Code Congressional & Administrative News, 1972 p. 4708 15
Senate Report 92-1125 p. 13 (1972) 15
House Report 92-1441 p. 10-11 (1972) 15
Hearings before the U.S. Senate Committee on Labor & Public welfare on S2318, 525 and 1547 . . 14

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

HERB'S WELDING, INC. and
UNITED STATES FIDELITY & GUARANTY CO.

Petitioner

VERSUS

ROBERT H. GRAY

Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

ORIGINAL BRIEF ON THE MERITS ON BEHALF OF HERB'S WELDING, INC. AND GUARANTY CO., PETITIONERS HEREIN

MAY IT PLEASE THE COURT:

This is the original brief on the merits on behalf of Herb's Welding, Inc. and United States Fidelity & Guaranty Co., petitioners herein.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 703 F.2d 176 (5th Cir. 1983). It has been reproduced in the Appendix to the petition for this writ (A-1, *et. seq.*). An

application for rehearing and a suggestion for a rehearing en banc were denied on August 8, 1983 and there is a separate opinion concerning this reported at 711 F.2d 666 (5th Cir. 1983). This opinion is reproduced at Appendix B attached to the writ application.

There were other opinions below, in the administrative and judicial ladder leading to this Court. The original opinion of the Administrative Law Judge is reproduced as Appendix C to the application. The matter was appealed therefrom to the Benefits Review Board and the opinion of that tribunal is attached to the writ application as Appendix D. The matter was further appealed to the United States Court of Appeals for the Fifth Circuit where the appeal was dismissed as premature. The decision is unreported as far as this writer can tell but the decision and order is appended to the writ application as Appendix E. The Administrative Law Judge issued and Opinion and Order on Remand which is attached to the application as Appendix F. The Benefits Review Board "Decision and Order" on appeal from that decision is attached as Appendix G to the writ application.

JURISDICTION

The jurisdiction of this Court is premised on 28 U.S.C. §1254(1), this being a case arising from one of the Courts of Appeals. The application for rehearing in the Court of Appeals and the suggestion for rehearing en banc was denied by that Court on August 8, 1983. The petition for a writ of certiorari was filed in this Court on October 14, 1983.

STATUTE INVOLVED

Sections 2(3) and 2(4) of the Longshoremen & Harbor

Workers Compensation Act (33 U.S.C. §§902(3) and 902(4)) provides in pertinent part:

> (3) The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and shipbreaker ...
>
> (4) The term "employer" means an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel).

Section 3(a) of the Longshoremen & Harbor Workers Compensation Act (33 U.S.C. §903(a)) provides in pertinent part:

> Sec. 3.(a) Composition [sic] shall be payable under this Act in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel ...

STATEMENT OF THE CASE

The facts applicable to this case are stated by the organ of the Court of Appeals (703 F.2d at 177) (A-2, Appendix to Petition for Writ of Certiorari):

"Gray, a welder with Herb's Welding, was assigned to the Bay Marchand oil and gas field which is located both in Louisiana territorial waters and over the Outer Continental Shelf. There Gray helped repair and maintain oil and gas lines and fixed platform production structures.

When he was on duty, Gray lived, ate and slept on a structure situated in Louisiana waters, and he worked on platforms located in both Louisiana and Outer Continental Shelf waters. He was transported to his daily work sites by boat or helicopter. On July 11, 1975, Gray was welding a two-inch gas line on a platform in the navigable waters of Louisiana when an explosion occurred. Gray, in trying to run from the area, twisted his knee.

The insurance company paid Gray temporary total disability, permanent partial disability and related medical expenses under Louisiana worker's compensation. .."

SUMMARY OF ARGUMENT

For an injury to a workman to be covered by the LHWCA, two conditions must be present: first, the accident must occur on a "covered situs" and the worker must have "status".[1] In the case at bar, the appellate court held that a platform inside the three mile limit[2] was a covered

[1] See the analysis in *Northeast Marine Terminals, Inc. v. Caputo*, 432 U.S. 249, 97 S.Ct. 2348 (1977)

[2] Thus, by its very terms, the Outer Continental Shelf Lands Act (43 U.S.C. §1331, et seq.) does not apply to the juridical transaction which forms the basis of this litigation. The platform, by definition lies within Louisiana's territorial waters, not on the Outer Continental Shelf.

situs and held that oil field labor or mineral extractive operations was "maritime employment" and therefore the workers performing work in the production of minerals on such platforms were covered by the LHWCA.

The decision below that oil field labor is somehow "maritime" in character when performed on platforms is contrary to prior decisions by this Court in *Rodrigue v. Aetna Cas. & Sur. Co.*, 395 U.S. 352, 89 S.Ct. 1835 (1969) and *Chevron Oil Co. v. Huson*, 404 U.S. 97, 92 S.Ct. 349 (1971). Additionally, it is contrary to the apparent intent of Congress. As a result, this decision cannot be permitted to stand and must be reversed by this Court.

Likewise, the decision below that fixed platforms are covered "siti" is something which is not inferred from anything in the statute and is not something that follows from any prior decisions of this Court. If this is the law, then this Court should decide it.

ARGUMENT

The considerations involved with the questions of "situs" and "status" are not sufficiently distinct for each to be bundled up into a neat ball for presentation in a brief like this. There are points which bear on each question and there is, of necessity, some overlap.

The consideration of the case starts with an analysis of the rationale of the opinion of the Court below. The court there properly states the threshhold issue: whether the LHWCA can reach an oil field worker injured on a fixed platform located in Louisiana territorial waters. Reference was immediately made to this Court's decision in *Rodrigue, supra*. It is stated that this Court "likened" these offshore

platforms to wharves located over navigable waters. It is then stated that wharves and piers were not covered by the LHWCA prior to 1972 (and therefore were not covered at the time of the decision in *Rodrigue*).[3] However, the reasoning goes, since the LHWCA amendments in 1972 extended coverage to wharves and piers, this in effect overruled that portion of *Rodrigue* and constituted oil field platforms as covered siti.[4]

In making this determination the Court of Appeals stated that these platforms "are essential to and customarily used in the loading and unloading of crews, supplies and oil." The Court used this factor to buttress the conclusion that the fixed platform is a covered situs.

The opinion then proceeds to discuss status and, premised on the same Court's previous decisions in *Pippin v. Shell Oil Co.*, 661 F.2d 378 (5th Cir. 1981) and *Boudreaux v. American Workover, Inc.*, 664 F.2d 463 (5th Cir. 1981), 680 F.2d 1034 (5th Cir. 1982), Cert. denied, __ U.S. __ 103 S.Ct. 815 (1983). The Court held that, as a matter of law, oil field labor is "maritime employment" as that term is defined in the LHWCA.[5] On the basis of this, the determination is

[3] See *Victory Carriers v. Law*, 404 U.S. 202, 92 S.Ct. 418 (1971).

[4] Here, again, the dichotomy between platforms on the Outer Continental Shelf and those in state waters should be kept in mind. Accidents and injuries which occur more than three miles offshore are covered by the LHWCA because of the operation of the Outer Continental Shelf Lands Act (OCSLA). *Rodrigue* did not deal with this point because (1) it was not before the Court, it could not be, and because (2) OCSLA mandated coverage by the LHWCA. The point here is that *Rodrigue* is irrelevant in a determination of "situs". The situs there was present as a matter of law. It was present because Congress mandated that it be so. There is no such mandate as to inshore platforms.

[5] The same Court has more recently taken this "principle of law" as being established in "this circuit", citing its own decisions in *Pippin*,

made that Gray was covered satisfying both the situs and status tests mandated by this Court's earlier decisions.

Thus, what we have is the use of this Court's landmark decision in *Rodrigue* to justify a finding of "situs", something that was not at issue there and something that decision does not stand for at all. And, in the very next section of the opinion, the Court turns its back on *Rodrigue* and decides that oil field work is maritime in nature, something totally inconsistent with the letter and spirit of the *Rodrigue* decision.

Status—The Inconsistency with Rodrigue and Huson

As mentioned above, a finding of coverage under the LHWCA requires a dual determination that there is a covered "situs" and a covered "status". In its determination of "status" the Court below makes a determination that oil field labor is "maritime employment". This determination is directly contrary to this Courts decision in the *Rodrigue* decision.

The issue in *Rodrigue* was whether plaintiffs in wrongful death actions could avail themselves of Louisiana law as regards recovery, or whether they were limited to the less generous provisions of the Death on the High Seas Act. This Court, reversing the Fifth Circuit held that offshore platforms were islands, that they were treated like federal enclaves in state territory, that federal law applied except where there was an hiatus therein, in which cases Louisiana law applied. On the face of it, it does not seem

(Footnote 5 continued)
Boudreaux, and in the instant case. See *Thornton v. Brown & Root, Inc.*, 707 So.2d 149 (5th Cir. 1983).

that that decision has anything to do with the dispute before the Court in the captioned case.

However, a review of the case, especially in the light of the appellate decisions[6] and in the light of a subsequent decision explaining and limiting the result,[7] it is apparent that, *prior* to this Court's decision in *Rodrigue*, oil field workers were held to be maritime workers, essentially because the work they performed was performed in a location surrounded by water and because the work they did was essential to the commerce of the area, which, being on the water, was "maritime". Indeed, this is the rationale of the two appellate decisions which were reviewed and reversed in the decision by this Court in *Rodrigue*.

Those cases, applying then settled jurisprudence, make the admiralty law applicable and take the expected next step to oust state law because of the uniformity of the admiralty principle. This Court's opinion in *Rodrigue* is a complete treatise on why admiralty law does not apply. The legislative history is traced, leading to the conclusion that Congress did not intend that admiralty law apply to persons working on platforms on the outer continental shelf. This history is only tangentially important here because this platform on the facts, was not on the outer continental shelf. What is important in the *Rodrigue* decision is the rationale which supports the conclusion that these workmen are, essentially, landbased workers doing land based type work.

[6] *Dore v. Link Belt, Inc.*, 391 F.2d 671 (5th Cir. 1968); *Rodrigue v. Aetna Cas. & Sur. Co.*, 395 F.2d 216 (5th Cir. 1968).

[7] *Chevron Oil Co. v. Huson*, 404 U.S. 97, 92 S.Ct. 349 (1971).

The *Huson* decision, which came down two years later makes it abundantly clear what the Court was doing in *Rodrigue*, that is, abandoning admiralty law in favor of state law as to disputes arising on fixed platforms. This decision involved the application of Louisiana prescription (statute of limitations) which would have barred plaintiff's claim. The precise holding is that the plaintiff in that case would not be barred because of his reliance on the "pre-Rodrigue application of admiralty law". However, the result makes it clear that prior to *Rodrigue*, admiralty law applied to these cases.

The point here is that *Rodrigue* and *Huson* stand for the proposition that offshore oil field workmen are not "maritime workers". If it were any other way, perhaps it could be said that there would be a resort to Louisiana wrongful death relief (barring application of the uniformity principle) but there is no way it would be said that Louisiana prescription applies. If these men were maritime workers, then the maritime doctrine of laches would necessarily apply. Put another way, if the Court of Appeals in this case is right, then Mr. Huson did not need to come here, prescription was no problem to him and Mrs. Dore and Mrs. Rodrigue would have gotten only pecuniary losses rather than the more generous recovery permitted under Louisiana law. But that didn't happen, and the reason it didn't was, in part, due to the fact that Mess'rs Dore, Rodrigue and Huson were *not* maritime workers.[8]

[8] At the time the *Rodrigue* decision came down, there was no wrongful death remedy in the federal maritime law. Subsequent to that decision, this Court overruled that line of cases and held that such a cause of action did exist under the maritime law. See *Moragne v. States Marine Lines*, 398 U.S. 375, 90 S.Ct. 1772 (1970); *Sea Land Services, Inc. v. Gaudet*, 414 U.S. 573, 94 S.Ct. 806 (1974). Thus, at the present time, insofar as the issue which was before the Court in *Rodrigue* is concerned, there is no difference between the result obtained in Louisiana or under the general maritime law.

Admittedly, *Rodrigue* and *Huson* involve cases which arose on platforms on the outer continental shelf. However, there is no demonstrable or demonstrated difference between the work described in those opinions or of work on the outer continental shelf in general and the work described in the case at bar. Indeed, the statement of facts in this case is that Gray worked sometimes on the outer continental shelf and sometimes on the state water platforms. Any distinction that *Rodrigue* and *Huson* are somehow different because they arose offshore and Gray arose inshore would be a distinction without a difference.

The genesis of the notion that oil field labor is somehow "maritime" in nature comes originally from the Fifth Circuit's opinion in *Pippin v. Shell Oil Co., supra.* It was carried forward by the same Court in *Boudreaux v. American Workover, Inc., supra.* A writ application was forwarded to this Court in *Pippin*, but was late filed and was therefore rejected by the Clerk. The writ application in *Boudreaux* was filed and was later denied by the Court on the basis of the then recent decision of this Court in *Director v. Perini North River Associates*, __ U.S. __, 103 S.Ct. 634 (1983).[9]

---

[9] The decision in *Director v. Perini* was on the basis of a finding that Mr. Churchill, the claimant there, would have been covered by the LHWCA prior to the passage of the 1972 amendments, and, since there was no evident intention on the part of Congress to restrict coverage, Churchill would necessarily be covered thereafter. On this basis, the decision of the Second Circuit denying benefits was reversed.

This result controlled the *Boudreaux* decision since Mr. Boudreaux had been hurt on a barge and he would have been covered by the LHWCA before 1972. No reasons were assigned for the denial of the writ but it is assumed that this was the reason for the denial. The question ancillary to that in *Boudreaux*, which adopted the reasoning in *Pippin* concerning the "maritimeness" of oil field work was not addressed by this Court.

There is nothing in *Pippin*, or *Boudreaux*, or this case, or the more recent decision of the Fifth Circuit in *Thornton v. Brown & Root,*[10] which justifies factually the conclusion that production of minerals from the seabed is "maritime commerce" or that the work being performed by those so engaged is maritime employment. If some factual showing had been made below and if this factual showing were stated into the opinions as justifying a change in this Court's conclusion in *Rodrigue*, then, perhaps there would be some justification for the differing result. However, as mentioned, there is no such factual justification either made or stated. Without such justification, we suggest that this Court's decisions in *Rodrigue* and *Huson* control. There is nothing maritime about the work which Robert Gray was doing at the time of his injury.

There is no automatic status finding because someone was involved in the production of minerals from the seabed of Louisiana waters. The holding to the contrary by the appellate court below is contrary to the prior decisions of this Court and should not be permitted to stand.

(Footnote 9 continued)

The result in *Director v. Perini* does not control this decision because the accident to Mr. Gray did not occur on a vessel, but on a platform. There is no "instant situs" in this case.

[10] 707 F.2d149 (5th Cir. 1983). *Thornton* holds that workers on land constructing offshore platforms are covered by the LHWCA their work is on the platforms which are used in the "maritime commerce" of producing oil from the seabed. This is the "next step" from the unsupported conclusion of *Pippin*, perpetuated in *Boudreaux* and in the opinion which is the subject of this application.

To the extent that this conclusion is one of law, we suggest that it, as well, is a matter which has not been passed on by this Court and that it is something that this Court should pass on, and we will treat of this in the next section as well.

2. Situs—A New Creation of Federal Jurisprudence

The federal point here is whether fixed platforms in state territorial waters are "siti" or locations as contemplated by the LHWCA such that maritime workers injured thereon are covered by the act. This Court has not passed on that point.

To start with, as conceded in the appellate opinion below, *Rodrigue* requires that this platform be treated as an island (703 F.2d at 179). There is nothing in the facts which would bring this platform or the location where the accident happened within the statutory definition of a covered situs. The statute says that accidents and injuries are covered where they occur "upon the navigable waters of the United States including any adjoining pier, wharf, dry-dock, terminal, building way, marine railway or other adjoining area customarily used by an employer in loading, unloading, repairing or building a vessel."[11] The facts of this case do not on their face bring the area where the accident occurred within that definition, especially in view of the *Rodrigue* opinion which makes this an island.

The reasoning of the Court of Appeals is that, since this Court "likened" platforms to wharves in the *Rodrigue* decision and since Wharves were not covered in 1969 but are not, as a result of the 1972 amendments to the LHWCA, therefore platforms are wharves and constitute covered "siti" at this time.

Two analyses have to be made of this reasoning. First, can it be said in the passage of the LHWCA extension in 1972 that Congress intended to extend coverage to

[11] 33 U.S.C. §903(a).

all oil field workers on inshore platforms? Secondly, is the analogy to the language of the *Rodrigue* decision appropriate in this case?

(a) *Congress' Intention*

It is, of course, undeniable that there is nothing in the 1972 extention of the LHWCA concerning oil field workers. More to the point, there appears to be nothing that evidences an intention to extend coverage of the act to workmen on platforms in state waters who were never covered before. See *Bible v. Chevron Oil Co.*, 460 F.2d 1218 (5th Cir. 1972); *Gray v. Chevron Oil Co.*, 631 F.2d 1263 (5th Cir. 1980), 644 F.2d 540 (5th Cir. 1981).[12]

[12] *Gray v. Chevron*, referred to above, involves the same Robert H. Gray who is respondent here, and reaches a directly contrary to the result here, at least on its face. Gray filed a suit in tort against Chevron for his injuries. Chevron interposed a "statutory employer" defense permitted in Louisiana. Louisiana extends the tort immunity of the employer to the general contractor or "principal" as well. See *Broussard v. Heebe's Bakery, Inc.*, 263 La. 561, 268 So.2d 656 (1968); *Barnes v. Sun Oil Co.*, 362 So.2d 761 (La. 1978). This principle was subsequently codified into positive law, La. Act 147 of 1976, La. R.S. 23:1032.

The point of this is that Chevron successfully interposed the Louisiana defensive doctrine and this was affirmed by the Fifth Circuit on the basis that this was a Louisiana state case, having occurred on an inshore platform, and that the LHWCA did not apply. In this case which is the subject of this appeal, the Court reversed itself, without mentioning its prior decision, holding that the LHWCA did apply. The anomaly is treated by the Court in its per curiam in the denial of the application for rehearing and the suggestion of rehearing en banc.

While the rationales of the two decisions are clearly inconsistent, the results are not necessarily so. It is legally possible for two compensation schemes to operate in the same geographical area, *Sun Ship Inc. v. Pennsylvania*, 447 U.S. 715, 100 S.Ct. 2432 (1981). There is nothing abhorrent in permitting a claim under one act and applying the defensive provisions of both acts to compensation claimant's suit in tort. Louisiana has a "statutory employer" defense and the LHWCA prohibits suits against co-employees.

It is true that another bill was considered in the U.S. Senate at approximately the same as the 1972 extension of the LHWCA which would have extended the LHWCA to all oil field workers, whether or not they were "seaman".[13] This writer does not find anything in the materials concerning that bill which would have indicated an intent to extend LHWCA coverage to platform workers in state waters (or, to the contrary to exclude them from coverage). However, the bill was broad enough arguably to extend coverage to everyone engaged in "maritime extractive operations." The important point in mentioning this bill is that the bill did not pass!!

It is possible to infer, from some of the discussion reported[14] that Congress intended to maintain coverage for those workers covered at the time of the discussion in the then pending extension of the LHWCA. (Which is the sense of the *Perini* case, *supra*.) However, the fact of the non-passage of this bill, given its subject matter (coverage of all workers engaged in "maritime extractive operations") coupled with the failure to include oil field workers *at all* in the extension of the LHWCA[15] leads inexorably to

[13] This was the so-called "Tower Bill" Senate Bill 1547, 92nd Congress. The hearings on this bill and the LHWCA extension were held at the same time. Hearings Before the Senate Subcommittee on Labor, Senate Committee on Labor & Public Welfare on S2318, S525 and S.1547, 92nd Congress. Second Session.

[14] *Id.* at 256, 487, 574, 577.

[15] In considering this, the Court should not be misled by the fact that oil field workers on the outer continental shelf are covered by the LHWCA because of the specific terms of the Outer Continental Shelf Lands Act, 43 U.S.C. §1333 (as it existed at the time this accident occurred in 1975). This is so, obviously, because Congress mandated that it be so, something that cannot be said of workers on Louisiana state water platforms. In cases arising on the outer continental shelf, there is coverage under the LHWCA because it is mandated by the terms of

the conclusion that workers in the same category as Mr. Gray were not intended to be included in the extension.

First, they are not mentioned, expressly or by implication. Second, a bill which likely would have included them was not passed by the Congress. The combination of these factors indicates that Congress did not intend that the extension act of 1972 to include these workers.

Finally, on this point, a welder on a production platform in state territorial waters is no more engaged in "maritime employment" than would be the employee hired to handle stored cargo in connection with transshipment or the clerical employees mentioned by Congress (S. Rep. 92-1125, p. 13 (1972); H. Rep. 92-1441, p. 10-11; U.S. Code Cong. & Adm. News, 1972, p. 4708, et seq.), and mentioned by this Court in *P. C. Pfeiffer Co., Inc. v. Ford*, 444 U.S. 69 at 79-80, 100 S.Ct. 328 at 335-36 (1979). Moreover, if this platform in inshore waters is to be treated as a covered "situs", it must be so treated as an *onshore* situs under *Pfeiffer, supra*. The point here is that there is nothing in Congress' action in the 1972 extension act which evidences an intention to cover Gray, either as a welder or as a maritime extractive worker on a fixed platform on Louisiana territorial waters.

(b) *Analogy to Rodrigue*

This leads to the second point. Boiled down to its

(Footnote 15 continued)
OCSLA. In other words, Congress has supplied situs and status by legislative mandate. Situs is supplied by the statement that every accident is covered by the LHWCA. Status is likewise supplied by the same statement since everything having to do with the production of minerals is supplied.

essentials, the reasoning of the Court of Appeals on the "situs" question is that (1) this Court in *Rodrigue* "likened" platforms to wharves, (2) wharves were not covered in 1969 when Rodrigue was decided; however, (3) wharves are covered now by virtue of the 1972 extension of the LHWCA, (4) therefore, platforms inshore are covered now.

We respectfully submit that the opinion of this Court at no time "likened" platforms to wharves. The word is used *once* in the *Rodrigue* opinion, then in the context of a discussion of the history of the OCSLA (395 U.S. at 366, 89 S.Ct. at 1842). Even the "likening" defeats the analogy because the remark in which wharves are referred to is a notation that accidents thereon were not covered because Congress, at that time, had not mandated that there be coverage. The point is that the opinion of this Court does not equate wharves and piers on the one hand with offshore platforms on the other. The sense on the opinion is more one of differentiation than of equating the structures and their purposes.[16]

[16] This "likening" or equating by the Court of Appeals is also unsupported in the record before the Court. There is nothing which indicates that the area of the platform where Gray was injured was used for loading and unloading (704 F.2d at 178) or that the entire platform was so used (704 F.2d at 179). Of course, if this were true, then the area is a maritime "situs" because of this fact alone. That it is not so in this case is seen by the mental gymnastics indulged by the Court of Appeals in resorting to the misinterpretation of the *Rodrigue* decision to justify its conclusion. Put another way, if there was maritime "situs" as a result of the nature of the activity thereon, why go to the trouble to justify it otherwise on such shaky grounds?

More to the point, a careful reading of the underlying decisions of the Administrative Law Judge and of the Benefits Review Board indicate absolutely no basis for such a conclusion. Under the appellate scheme set up in the LHWCA (33 U.S.C. §921[c]) findings of fact must be made on the trial level. If such a finding were necessary, then, perhaps the matter should have been remanded once more because it simply does not exist otherwise in the record before that Court or the record here.

We further respectfully submit that the reasoning that this Court used in *Victory Carriers, Inc. v. Law*, 404 U.S. 202, 92 S.Ct. 418 (1971) is applicable here. There, the suggestion was made that there should be coverage to workmen on wharves because they were doing essentially the same work that their co-workers were doing in the holds of the ships only a short distance away. This Court rejected the argument and closed with the following:

> "...Congress might well prefer not to extend the jurisdiction of the federal courts. On the other hand, if denying federal remedies to longshoremen injured on land is intolerable, Congress has ample power under Arts. I and II of the Constitution to enact a suitable solution."

This is no less true in this case. It is apparent from that above that Congress has not seen fit to extend coverage to workers on fixed platforms in state waters. It is also apparent that Congress had before it a bill which would have had the effect of extending such coverage and that that bill was not passed. The effect of the decision of the Court of Appeals is to accomplish withe the stroke of a judicial pen that which Congress declined to do.

In conclusion, we respectfully suggest that the decision of the Court of Appeals that oil field labor is "maritime in nature" is (1) not supported in the record of this case or of the cases to which reference is made; (2) is directly contrary to and in the face of the major prior decisions of this Court on point, and (3) Constitutes a decision of an important point of federal law which should be decided by this Court. Specifically, Congress declined to grant coverage under the LHWCA to claimants like Mr. Gray by failing to adopt the Tower Bill mentioned above. If coverage is to be

extended judicially, it should be this Court which extends it, not the Court of Appeals.

Likewise, the holding that platforms in state waters are covered "siti" is something that Congress failed to enact, given the specific opportunity to do so. If the failure of Congress to pass this bill is to be corrected by the Courts, it should be this Court which makes the correction, not the Court of Appeals.

However, following the logic that this Court has followed previously, we suggest that the extension of coverage to plaintiffs like Mr. Gray is something which should be left to Congress. When the Court of Appeals usurped Congress' function in making such an extension, it erred and this error should be reversed by this Court.

CONCLUSION
PRECISE RELIEF SOUGHT

The precise relief sought by petitioners is the reversal of the decision of the Court of Appeal and the Benefit Review Board. The claim for compensation presented on behalf of Robert H. Gray should be dismissed or this Court should order the dismissal below on the ground that there is no coverage under the LHWCA and therefore no right in the said claimant to recover herein.

GOLD, LITTLE, SIMON, WEEMS & BRUSER
JOHN F. SIMON, ESQ.
P.O. Box 6118
Alexandria, La. 71301

MONTGOMERY, BARNETT, BROWN & READ

Wood Brown III
1800 First Nat'l Bank of Commerce Bldg.
New Orleans, La. 70112

CERTIFICATE OF SERVICE

Undersigned counsel, a member of the Bar of this Court, certifies that three copies of this petition and all related documentation has been mailed to each opposing counsel as follows:

Honorable Rex E. Lee
Solicitor General of the United States
Department of Justice
Washington, D.C. 20530

Joshua S. Gillelan, II, Esq.
Office of the Solicitor of Labor
U.S. Department of Labor
Suite N2620 - NDOL
Washington, D.C. 20210

James J. Brady, Esq.
P.O. Box 1792
Alexandria, La. 71301

T. Gerald Henderson, Esq.
P.O. Box 407
Alexandria, La. 71301

Undersigned counsel makes this certificate for purposes of complying with Rule 28.3 and 28.5 of the Rules of this Court.

Wood Brown III

Office - Supreme Court, U.S.
FILED
MAY 2 1984
ALEXANDER L. STEVAS
CLERK

(5)

NO. 83-728

In the Supreme Court of the United States

OCTOBER TERM, 1983

HERB'S WELDING, INC. and
UNITED STATES FIDELITY & GUARANTY CO.

Petitioners

VERSUS

ROBERT H. GRAY

Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

JOINT APPENDIX

WOOD BROWN III
MONTGOMERY, BARNETT,
BROWN & READ
1800 FIRST NATIONAL BANK
OF COMMERCE BUILDING
NEW ORLEANS, LOUISIANA 70112
TELEPHONE (504) 561-8989

ATTORNEYS FOR PETITIONERS
(Attorneys Continued Inside Cover)

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

8pp

BEST AVAILABLE COPY

HON. REX E. LEE
SOLICITOR GENERAL OF THE
UNITED STATES
DEPARTMENT OF JUSTICE
WASHINGTON, D.C. 20530

JAMES J. BRADY, ESQ.
P.O. BOX 1792
ALEXANDRIA, LA. 71301

T. GERALD HENDERSON, ESQ.
P.O. BOX 407
ALEXANDRIA, LA. 71301

TABLE OF THE PARTS OF THE RECORD INCLUDED (RULE 30.5)

1. Docket sheets of the court below 1
2. Decision and Order of the Administrative Law Judge (original)* 6
3. Decision and Order of the Benefits Review Board (Original)* 6
4. Per curiam order of the United States Court of Appeals for the Fifth Circuit (original)* 6
5. Decision and order on Remand by the Administrative Law Judge* 6
6. Decision and order of the Benefits Review Board (on remand)* 6
7. Decision of the United States Court of Appeals for the Fifth Circuit and per curiam order denying the application for Rehearing* 6

The following portions of the record are agreed upon by the parties and are submitted in compliance with Rule 30.1 of the Rules of this Court:

(1) Relevant Docket Entries in the Courts below:

EDITOR'S NOTE

PAGES 2 through 5 WERE POOR HARD COPY AT THE TIME OF FILMLNG. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

397 AJ-132

SUBJECT	CROSS APPEAL NO.	CASE NUMBER
X		82-4147

CIRCUIT'S APPEAL ____ FROM ____ DISTRICT OF ____ AT Louisiana Case

DATE DOCKETED 04/20/82 DIS FEE PAID Pd. CCA JUDGE ____

DATE NOTICE OF APPEAL FILED ____

DC DOCKET NUMBER BRB Nos. 78-431 & 81-643 REPORTER ____

HERB'S WELDING and UNITED STATES
FIDELITY & GUARANTY COMPANY,

Petitioners,

versus

ROBERT H. GRAY and THE DIRECTOR,
OFFICE OF WORKERS' COMPENSATION
PROGRAMS, UNITED STATES DEPARTMENT
OF LABOR,

Respondents,

APPEARANCE FILED—DATE	CODE	ATTORNEYS FOR APPELLANT	ARG
4-27-82	✓	John F. Simon, P.O. Box 6118, Alexandria, LA 71301 (318-445-6471)	✓
		MONTGOMERY, BARNETT, BROWN & READ:	
5-13-83	X	Wood Brown,III, 1800 First National Bank of Commerce Bldg.,New Orleans,LA 70112	
6/7/83	✓	FOR AMICUS: KERR-MC GEE CORP. Christopher Tompkins, 4700 One Shell Square, NOLA 70139 581-5144	
		FOR AMICI TEXACO ET AL.	
JUN 10 1983	✓	Robert M. Contois, Jr., 225 Baronne St, 25th fl., NOLA 70112 (525-6401)	

APPEARANCE FILED—DATE	CODE	ATTORNEYS FOR APPELLEE	ARG
		T. Timothy Ryan, Jr., Solicitor of Labor, U.S. Dept. of Labor, Sta. N-2716, NDOL, Wash., D.C. 20210 FTS 359-8461	
05 27 82	✓	Joshua T. Gillelan, II -do- N-2620	✓
06-23-82	X	James J. Brady, P.O. Box 1792, Alexandria, LA 71301 318/ 442-4501	
2 2/83	✓	E. Gerald Henderson, 710 Murray St.,Alexandria,LA 71301	

OTHER INTERESTED PARTIES

Benefits Review Board, U.S. Dept. of Labor, 1111 - 20th St., N.W., Sta. 757, Wash., D.C. 20036

FILED

CASE CALENDARED

TITLE: HERB'S WELDING, ET AL. -vs- ROBERT H. GRAY 82-4147

1. RECORD, EXHIBITS AND BRIEF INFORMATION	Filing
3-24-82 Partial Record on Cert. List / Record on Appeal	No. of Vols. 2 ✓
Supp. Record	No. of Vols.
Second Supp. Record	No. of Vols.
Third Supp. Record	No. of Vols.
5-26-82 Exhibits ☐ Env ✓ ☐ Box ☐ Pkg ☐ Roll	
Exhibits ☐ Env ☐ Box ☐ Pkg ☐ Roll	
Appendix ☐ (Pt)	
7-8-82 Record Excerpts ✓ 10 vols to 6/09	
Supp. Certified List	
Briefing Notice Sent ✓ 7-26-82	
6/09/82 Brief for Appellant ✓ 7-26-82	
Brief for Appellant	
Brief for Appellant	
Brief for Cr. Appellant	
8-02-82 Brief for Appellee ✓	
OCT 1 1982 Brief for Appellee DIRECTOR ✓	
Brief for Appellee	
Brief for Cr. Appellee	
8-13-82 Reply Brief for Appellant ✓	
OCT 15 1982 Reply Brief for 2d Appellee 10-4-82 ✓	
Supp. Brief for Appellant	
Supp. Brief for Appellee	
Brief for Amicus	
Intervenor	
Rule 28(j) letter—Appellant	
2/23/83 Rule 28(j) letter—Appellee (CA)	

A. EXTENSION Pfg. Motion for:	Order Pfd.	Ext. to
Transcript		
Transcript		
Transcript		
Appellant's Brief		
Appellant's Brief		
Appellant's Brief		
7/9/82 Appellee's Brief (Joint)		7/26/82
Appellee's Brief		
Appellee's Brief		
Reply Brief		

B. CALENDAR INFORMATION
Special Panel
Summary Panel
12-21-82 Case Argued to 2-2-83 ☐E ☐W ☐E ☐
Case Cont'd for Reassignment
Case Reassigned to ☐E ☐W ☐E ☐
Hearing Set CC-HT-TAR
2-2-83 Case Argued ☐ by Appellant ☐ by Appellee
Case Sub w/o Arg ☐ by Appellant ☐ by Appellee

C. OPINION INFORMATION ✓			
4-12-83 Opinion Circulated			
CC Affirmed			
Reversed			
Affd in Pt	P.C.		Cons. Appls
Vacated	Signed		Dis
Dismissed	Rule 21		Dis. in Pt
Opinion Withdrawn			

MISCELLANEOUS FILINGS	Filing
Dup. Notice of Appeal and Clerk's Statement of Docket Entries	
Papers Transf. from Misc. No.	
Order of DC Granting Appeal IFP	
Order of DC Appointing Counsel	
Affidavit of Financial Status	
CJA 20 Appt / Voucher Filed	

AGENCY REVIEW CASES	Filing
04/21/82 Petition for Review of Order (S) of ☐ NLRB ☐ FERC ☐ ICC ☒ BRB	
Application for Enforcement—NLRB	
Answer to Application for Enforcement	
Cross Application for Enforcement	

D. MISCELLANEOUS INFORMATION	
4/28/83 Mdte for Ext.—Ext. to	CA 5/12 5/16 R 28 (j) Ltr.
Mdte for Ext.—Ext. to	
05-17-83 Request for Rehearing (P)	
Response for Rehearing ☐ Appellee ☐ Reg ☐ En Banc	
5-24-83 Request for Rehearing (P)	
Response of ☐ Appellant ☐ Appellee ☐ Reg ☐ En Banc	
7-5-83 Order Denying Rehearing (P) p 6171	
☐ Dismissing	
☐ Opinion (P)	
☐ Order re Petition for Rehearing (P)	

82-4147

NO.

8. MOTIONS

Filing Motion to or for:	Response Filed By	Date	Granted	Denied	By Court	By Clerk	Date
Mandamus							
Reinstate Appeal							
Stay Further Proceedings in CA							
Stay Pending Appeal							
Injunction Pending Appeal							
Consolidate Appeals W/							
Leave to Appeal IFP							
Bail Pending Appeal							
Withdraw as Counsel							
Appointment of Counsel							
Supplement Record							
Expedite							
File Brief in Excess Pgs.							
File Brief in Excess Pgs.							
Dismiss by Appellant							
Dismiss by Appellee							
Amicus Curiae							
File Supp. Brief							
Stay of Mandate							
Recall of Mandate							
Intervene							
Intervene							
File Reply Br. out of time							

9. OTHER DOCKET ENTRIES

3/23/82	Flg. Motion of Respondent, Director, for leave to file brief out of time. (GRANTED 10/1/82 GB)
5/16/83	Flg. Motion of Texaco, Inc., Gulf Oil Corp., and Amoco Production Co., USA for leave to file an amici curiae brief in support of application for rehearing en banc. [illegible]
5/26/83	Flg. Motion of Kerr-McGee Corporation for leave to file an amicus curiae brief in support of application for rehearing
5/27/83	Flg. Order GRANTING motion of Texaco, Inc., Gulf Oil Corp. and Amoco Production Co., U.S.A. for leave to file an amici curiae brief in support of petitioner's application for rehearing en banc. (CC)
5/27/83	Flg. Brief of amici curiae, Texaco, Inc., Et Al., in support of application for rehearing en banc. (J)
6/1/83	Flg. Order GRANTING motion of Kerr-McGee Corp. for leave to file an amicus curiae brief in support of the applications for rehearing. (CC)

10. JUDGMENT OR MANDATE INFORMATION

5/2/83	Bill of Costs
	Flg. & Entg. Judgment
	Msg. Copy of Jdgt. to Bd & Crsl.
	Mandate Stayed to
7/14/83	Jdgt. as Mdt. Issd. to Clerk
	Jdgt. as Mdt. Recd. to Clerk
	Dismissal Issd. to Clerk
7/14/83	Record on Appeal Recd. to Clerk
7/14/83	Exhibits Recd. to Clerk

11. SUPREME COURT INFORMATION

	Notice of Appeal to S.C.
	Preparing Proceedings on Certiorari 156
	Preparing Supp. Proceedings on Cert.
	Transmitting Orig. Exhibits to S.C.
	Order of S.C. —Ext. to
11-14-83	Notice of Flg. of Cert. Pet. on 10-14-83
3/23/84	Order of S.C. ☐ Denied ☑ Granted
	Notice of Denial of Pet. for Rehearing
	Opinion of S.C. dated
	Judgment of S.C.

Page 4 of 4 pages

82-4147

Date	Filings-Proceedings
06/10/83	Flg. Brief of Amicus Curiae, Kerr-McGee Corp., in support of petitioners' application for rehearing en banc (J)

(2) Relevant Pleadings, Jury Instructions, etc.

(None. This case arose through the administrative procedure provided in 33 U.S.C. 921)

(3) Findings, Conclusions Opinions

(a) The original decision and order of the administrative law judge is attached to the petition for certiorari as Appendix C (pages A-14 through 18).

(b) The first decision and order of the Benefits Review Board is attached to the petition for certiorari as Appendix D (pages A-19 through 37).

(c) The first Opinion of the United States Court of Appeals for the Fifth Circuit is attached to the petition for certiorari as Appendix E (page A-38).

(d) The Decision and Order on Remand of the administrative law judge is attached to the petition for certiorari as Appendix F (Pages A-39 through 45).

(e) The Decision and Order of the Benefits Review Board (unpublished) is attached to the petition for certiorari as Appendix G (Pages A-46 through 49).

(4) The judgment, order or decision in question is the decision of the United States Court of Appeals and the denial of the application for rehearing and suggestion for rehearing en banc, which are attached to the petition for certiorari as Appendices A and B (Pages A-1 through 18).

Office - Supreme Court, U.S.
FILED
MAY 4 1984
ALEXANDER L. STEVAS,
CLERK

NO. 83-728

In the Supreme Court of the United States

OCTOBER TERM, 1983

HERB'S WELDING, INC. and
UNITED STATES FIDELITY & GUARANTY CO.

Petitioner

VERSUS

ROBERT H. GRAY

Respondent

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITIONER

CHRISTOPHER TOMPKINS
of
DEUTSCH, KERRIGAN & STILES
755 Magazine Street
New Orleans, Louisiana 70130
Telephone: 504/581-5141
Attorneys for Amicus Curiae
Kerr-McGee Corporation

Of Counsel:
RENE' H. HIMEL, JR.

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

BEST AVAILABLE COPY

13 pp

QUESTIONS PRESENTED FOR REVIEW

(1) Whether it is proper for the Court of Appeals to extend the landward coverage of the Longshoremen's and Harbor Workers' Compensation Act to areas not specifically included in the Act or its amendments, in the absence of an expression of congressional intent to include such areas.

(2) Whether it is proper for the Court of Appeals to extend the coverage of the amended Longshoremen's and Harbor Workers' Compensation Act to a classification of workers or to an occupation not specifically included in the Act or its amendments.

(3) Whether it is proper for the Court of Appeals to extend the coverage of the amended Longshoremen's and Harbor Workers' Compensation Act to a non-maritime worker doing repair work on a fixed platform not owned or operated by that worker's employer and located in state waters.

INTEREST OF KERR-McGEE CORPORATION

Kerr-McGee Corporation is the owner and operator of numerous stationary drilling and production platforms offshore Louisiana and Texas. These platforms are over the Continental Shelf or in Louisiana territorial waters. Kerr-McGee employs about 350 workers on these platforms, of which number roughly 50% are working on one or another of these platforms on any given day. In addition to its own employees, there may be something in the vicinity of 200 contract workers on these platforms daily.

Until now, Kerr-McGee has consistently compensated its employees or their dependents, in the event of disability or death occurring on a platform located in Louisiana's waters, in accordance with the compensation laws of that state. The decision of the Court of Appeals in the case at bar has confused a heretofore clear mandate and brings uncertainty into Kerr-McGee's offshore compensation program.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
INTEREST OF AMICUS CURIAE	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
CONSENT OF PARTIES	1
SUMMARY OF ARGUMENT	1
ARGUMENT	2
CONCLUSION	6
CERTIFICATE OF SERVICE	8

TABLE OF AUTHORITIES

Cases: **Page**

Boudreaux v. American Workover, Inc.,
664 F.2d 463 (5th Cir. 1981) 5

Director, Office of Workers' Compensation Programs, v. Perini North River Associates,
__ U.S. __, 103 S.Ct. 634 (1983) 4, 5, 6

Herb's Welding v. Gray,
703 F.2d 176 (5th Cir. 1983) 2, 3, 4, 5

Northeast Marine Terminal Co. v. Caputo,
432 U.S. 249, 97 S.Ct. 2348 (1977) 5

P. C. Pfeiffer Co. v. Ford,
444 U.S. 69, 100 S.Ct. 328 (1979) 5

Philbrook v. Glodgett,
421 U.S. 707, 95 S.Ct. 1893 (1975) 2

Pippen v. Shell Oil Company,
661 F.2d 378 (5th Cir. 1981) 5, 6

Rodrigue v. Aetna Casualty & Surety Co.,
395 U.S. 352, 89 S.Ct. 1835 (1969) 2, 5, 6

Weyerhaeuser Co. v. Gilmore,
528 F.2d 957 (9th Cir. 1975), *cert. den.*,
429 U.S. 868 (1976) 6

Statutes:

33 U.S.C. 903(a) 3

U.S. Code Congressional and Administrative News
1972, Vol. 3, p. 4708 4

NO. 83-728

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

HERB'S WELDING, INC. and
UNITED STATES FIDELITY & GUARANTY CO.

Petitioner

VERSUS

ROBERT H. GRAY

Respondent

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITIONER

CONSENT OF PARTIES

This brief is filed with the written consent of all parties hereto, these consents being on file with the Clerk of this Court.

SUMMARY OF ARGUMENT

The extension by the United States Court of Appeals for the Fifth Circuit of the "situs" coverage of the Longshoremen's and Harbor Workers' Compensation Act (LHWCA) to fixed offshore drilling platforms, classified by

this Court as artificial islands and not included expressly or inferentially in the structures to which Congress extended such coverage in 1972, and its extension of the Act's "status" coverage to non-maritime workers, not in the platform owner's employ and who do not load, unload, build or repair ships, is founded upon an incorrect legal premise and amounts to judicial legislation beyond the intent of the Congress.

ARGUMENT

Situs

This Court has said that in expounding a statute [a court] must not be guided by a single sentence or member of a sentence but [must] look to the provisions of the whole law, and to its object and policy.[1] So should it be in expounding an opinion of this Court for purposes of precedent.

Instead, the Court of Appeals picked up a word from the decision in *Rodrigue v. Aetna Casualty & Surety Co.*, 395 U.S. 352 (1969), and bottomed its decision that the situs requirement is met here, on the proposition that in *Rodrigue* "Justice White...likened (platforms) to wharves located above navigable waters". *Herb's Welding v. Gray*, 703 F.2d 176, 177.

What Justice White's opinion in *Rodrigue* in fact did was to hold that fixed offshore drilling platforms are artificial islands, and that accidents thereon "would be no more under maritime jurisdiction than accidents on a wharf above navigable waters". 395 U.S. at 366.

[1] *See, Philbrook v. Glodgett*, 421 U.S. 707, 95 S.Ct. 1893, 1898 (1975).

Nonetheless, the Fifth Circuit went on to say that fixed platforms are in effect wharves for LHWCA purposes because they "are essential to and customarily used in loading and unloading of crews, supplies and oil (and) their function is precisely that of wharves". 703 F.2d at 178.

It is quite a judicial leap to classify an entire artificial island, used to drill wells to produce oil and gas, as a wharf merely because crews, supplies and oil are incidentally loaded thereon and unloaded therefrom, especially since, in extending LHWCA coverage to "any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used *by an employer* (emphasis added) in loading, unloading, repairing or building a vessel",[2] Congress made no mention of drilling platforms.[3]

The Court of Appeals stated that the "jurisprudential concept of an island carries with it the concept of the island's shore and the function of the structure as a wharf projects from that 'land' ". Nowhere does the Court say that Gray was injured on the island's shore, however, and it is clear that he was not engaged in loading or unloading a vessel, nor was his employer, even if artificial islands or portions thereof are sometimes used for such purposes.

Status

Gray was injured while working as a welder on a

[2] 33 U.S.C. §903(a).

[3] Many services on offshore platforms are rendered by non-maritime workers, like Gray, in the employ of non-maritime independent contractors, yet the Fifth Circuit nowhere addressed the fact that the platform probably was not used for loading and unloading by Gray's employer, Herb's Welding, but by the platform's owner (Chevron).

fixed platform located within the territorial waters of the State of Louisiana. His employer, Herb's Welding, was a company which provided welding services to oil field rigs. *Herb's Welding v. Gray*, 703 F.2d 176, 177. According to the findings of fact and conclusions of law entered by the Administrative Law Judge, the work activity of Gray and his employer was totally involved in exploration, development and transmission of oil and gas from under and on submerged lands. That judge found that there was nothing inherently maritime about these activities (App. "C", Petition for Writ of Certiorari herein, p. A-17). Gray was not engaged in loading, unloading, repairing or building a vessel.

A purpose of the Committee on Education and Labor, to which was referred the bill to amend the Longshoremen's and Harbor Workers' Compensation Act, was to permit a uniform compensation system to apply to employees who would otherwise be covered by the Act for part of their activity.[4] The Committee expressly reported that it did not intend to cover employees who are not engaged in loading, unloading, repairing or building a vessel, just because they are injured in an area adjoining navigable waters used for such activity.[5]

In other words, the Committee said, in effect and for instance, that a longshoreman who is busy loading a ship and so covered by the LHWCA while driving his forklift across the deck of the vessel toward the dock, would now likewise be covered when he gets on the dock—so would a

[4] U.S. Code Congressional and Administrative News, 1972, Vol. 3, p. 4708.

[5] *Ibid;* See, *Director v. Perini North River Associates*, 103 S.Ct. 634, 648 (1983)

fellow-employee who does not necessarily get on the vessel[6]—but just because a longshoreman injured on the dock is now covered, coverage will not be extended to a non-longshoreman injured on the same dock.

Nevertheless, the Court of Appeals here resolved the "status" requirement in favor of coverage of this non-longshoreman (Gray) by holding that "his work was necessary for the offshore drilling process in that gas line maintenance is vital to the drilling and removal of gas and oil" and that "offshore drilling—the discovery, recovery and sale of oil and natural gas from the sea bottom—is maritime commerce". 703 F.2d at 180.

The only authority cited for this proposition is the same court's decision in *Pippen v. Shell Oil Co.*, 661 F.2d 378, 384 (5th Cir. 1981), which, unlike this case, involved a worker on a vessel (a drilling barge), and not one on a fixed platform or artificial island. While the Court may have reached the correct conclusion in *Pippen*, it was not for the right reason. Pippen, because he was injured while working on navigable waters, retained a traditional claim under LHWCA, since nothing in the 1972 amendments to the Act took away coverage which existed before the amendments.[7]

[6] See, *P. C. Pfriffer Co. v. Ford*, 444 U.S. 69, 81-83 (1979); *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 274 (1977); "Since it is clear that (Caputo) would have been covered while unloading such a vessel, to exclude him from the Act's coverage in the morning but include him in the afternoon would be to revitalize the shifting and fortuitous coverage that Congress intended to eliminate."

[7] See, *Director v. Perini North River Associates*, 103 S.Ct. 634, 651 and Judge Gee's comments on "Inland marine oil production as 'maritime commerce or navigation' " in his dissent opinion in *Boudreaux v. American Workover, Inc.*, 664 F.2d 463, 479 (5th Cir. 1981). See also, expert testimony cited in *Rodrigue v. Aetna Casualty & Surety Co.*, 395 U.S. 352, 365 (1969).

In likening Pippen's situation to Gray's, the Court of Appeals has equated the situation of a person traditionally covered, who worked on a vessel in navigable waters and whose work "was essential to the function of the vessel" [*Pippen v. Shell Oil Co.*, 661 F.2d 378, 383 (5th Cir. 1981)] to that of a worker on a fixed platform or artificial island engaged in a non-maritime activity. Not only is the analogy in direct conflict with the legislative intent (as shown above), but it appears to be inconsistent with this Court's holding in *Rodrigue* that a drill pipe tester's fall from a derrick on a drilling platform "had no more connection with the ordinary stuff of admiralty than do accidents on piers".

It also appears to conflict with the holding of the United States Court of Appeals for the 9th Circuit—that the "status" issue depends upon whether the employee's activities have a "realistically significant relationship to traditional maritime activity." *Weyerhaeuser Co. v. Gilmore*, 528 F.2d 957, 961 (9th Cir. 1975), *cert. denied* 429 U.S. 868, since it can hardly be said that this welder's work had a realistic relationship to traditional maritime activity.

CONCLUSION

To paraphrase the Supreme Court in *Perini*, "the question of (Gray's) coverage is an issue of statutory construction and legislative intent".[8] Yet the Court of Appeals here attempts to force the congressionally expanded definition of "navigable waters" to now include offshore platforms, in spite of the legislative intent—well shown in *Rodrigue*, to treat such platforms as islands; and the Court of Appeals classifies an activity (welding) as "maritime employment", without any statutory justification for so

[8] 103 S.Ct. at 641.

doing and without any attempt to show a legislative intent to add such a classification to those occupations specifically enumerated in the definition of "employee".[9]

In reasoning as it has, the panel has overlooked the underlying proposition that the 1972 amendments concern themselves with landward extension of coverage to persons (or their ilk) whose basic work is on actual navigable water and has affirmed an award to a type of worker who for all that is shown, may never work on actual navigable waters and certainly is not a member of an occupation which is enumerated in the statute or the 1972 amendments or for which there is any basis for inferential inclusion.

Respectfully submitted,

CHRISTOPHER TOMPKINS
DEUTSCH, KERRIGAN & STILES
755 Magazine Street
New Orleans, Louisiana 70130
Telephone: 504/581-5141

Of Counsel:
RENE' H. HIMEL, JR.

[9] Cf. Justice Rehnquist's concurring opinion in *Perini*, and see Justice Stevens' dissenting opinion in that case, 103 S.Ct. 634, 652.

CERTIFICATE OF SERVICE

Undersigned counsel, a member of the Bar of this Court, certifies that three copies of this amicus curiae brief have been sent to each counsel of record by depositing same in the United States Mail, postage prepaid this ____ day of May, 1984.

Rex E. Lee, Esq.
Solicitor General
Department of Justice
Washington, D.C. 20530

James J. Brady, Esq.
P.O. Box 1792
Alexandria, La. 71301

T. Gerald Henderson, Esq.
P.O. Box 407
Alexandria, La. 71301

Wood Brown, III, Esq.
Montgomery, Barnett, Brown & Read
1800 First National Bank of Commerce Bldg.
New Orleans, Louisiana 70112-1799

Undersigned counsel further certifies that all parties required to be served have been served.

Undersigned counsel makes this certificate for purposes of complying with Rules 28.3 and 28.5 of the Rules of this Court.

CHRISTOPHER TOMPKINS
DEUTSCH, KERRIGAN & STILES

(8)

NO. 83-728

Office - Supreme Court, U.S
FILED
MAY 7 1984
ALEXANDER L. STEVAS,
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1983

HERB'S WELDING, INC. and
UNITED STATES FIDELITY & GUARANTY CO.

Petitioner

VERSUS

ROBERT H. GRAY

Respondent

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF OF AMICI CURIAE, TEXACO, INC., GULF OIL CORPORATION, AND AMOCO PRODUCTION COMPANY, U.S.A. IN SUPPORT OF PETITIONER

ROBERT M. CONTOIS, JR.
GEORGE R. ALVEY, JR.
Jones, Walker, Waechter, Poitevent,
Carrere & Denegre
225 Baronne Street-28th Floor
New Orleans, Louisiana 70112
Telephone: (504) 581-6641

ATTORNEYS FOR AMICI CURIAE,
TEXACO, INC.
GULF OIL CORPORATION, AND
AMOCO PRODUCTION COMPANY,
U.S.A.

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

BEST AVAILABLE COPY

23pp

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i
TABLE OF AUTHORITIES ii
INTEREST OF AMICI CURIAE 1
SUMMARY OF ARGUMENT 2
ARGUMENT 3
CONCLUSION 17
CERTIFICATE OF SERVICE 19

TABLE OF AUTHORITIES

Cases: **Page**

Blanchard v. Engine & Gas Compressor Service, Inc., 613 F.2d 65 (5th Cir. 1980) 15

Boudreaux v. American Workover, Inc., 664 F.2d 463 (5th Cir. 1981); *Rehearing Granted* 664 F.2d 480 (5th Cir. 1982); Opinion on Rehearing 680 F.2d 1034 (5th Cir. 1982); *cert. denied*, __ U.S. __, 103 S.Ct. 815 (1983) . . 12, 13

Director, Office of Workmens Compensation Programs, v. Perini North River Associates, 459 U.S. 297, 103 S.Ct. 634 (1983) 8, 14

Gray v. Chevron Oil Co., 631 F.2d 1263 (5th Cir. 1980); 644 F.2d 540 (5th Cir. 1981) 9, 14, 15

Herb's Welding Inc. v. Gray, 703 F.2d 176 (5th Cir. 1983); *Reh. den, 711 F.2d 666 (1983); cert. gr.* 80 L.Ed.2d 122 (1984) 4, 5, 6, 7, 8

Nacirema Operating Company v. Johnson, 396 U.S. 212 (1969) 4, 9, 11, 13

Odom Constr. Co. v. United States Dep't. of Labor, 622 F.2d 110 (5th Cir. 1980); *cert. den*, 450 U.S. 966 (1981). 11

P. C. Pfeiffer Co., Inc. v. Ford, 444 U.S. 69 13

Pippen v. Shell Co., 661 F.2d 378 (5th Cir. 1981) 12

Rodrigue v. Aetna Cas. & Sur. Co., 395 U.S. 352 (1969) 4, 5, 6, 7, 8

St. Julien v. Diamond Drilling Co., 403 F.Supp. 1256 (E.D.La. 1975) 14

Sohyde Drilling & Marine Co. v. Coastal States Gas Producing Co., 644 F.2d 1132 (5th Cir. 1981) 14

Thornton v. Brown & Root, Inc., 707 F.2d 149 (5th Cir. 1983); *cert. den*, __ U.S. __, 104 S.Ct. 735 (1983) 16

Victory Carriers, Inc. v. Law, 404 U.S. 202 (1971) 9

STATUTES:

33 U.S.C. §902(3) 4, 6

33 U.S.C. §903 . . . . . 10, 16

43 U.S.C. §1333 *et seq.* 4

OTHER AUTHORITIES:

House Report 92-1441, 1972 U.S. Code Cong. & Admin. News 4698, 4708 10

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

NO. 83-728

HERB'S WELDING, INC. and
UNITED STATES FIDELITY & GUARANTY CO.

Petitioner

VERSUS

ROBERT H. GRAY

Respondent

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF OF AMICI CURIAE, TEXACO, INC., GULF OIL CORPORATION, AND AMOCO PRODUCTION COMPANY, U.S.A. IN SUPPORT OF PETITIONER

INTEREST OF AMICI CURIAE

Texaco, Inc., Gulf Oil Corporation, and Amoco Production Company, U.S.A., pursuant to Rule 36 of the Supreme Court Rules file this brief as Amici Curiae.

Amici are the owners and operators of a substantial number of fixed structures located within Louisiana teritorial waters dedicated to the production of petroleum

and other hydrocarbon substances. They employ a substantial number of persons who work on those structures. The decision of the Fifth Circuit Court of Appeals in this matter affects them directly, both with regard to the administration of their compensation programs for those employees and with regard to employees of independent contractors working aboard the inland artificial islands in question. Amici Curiae suggest that the Court should consider their contentions because of the substantial impact the Fifth Circuit's decision will have on them and other operators of such structures, and because no party to the appeal has an interest similar to theirs.

SUMMARY OF ARGUMENT

The Fifth Circuit decision in this matter inappropriately extends LHWCA coverage to an entire industry which was previously not covered by the Act. Such a massive extension of LHWCA coverage which flows from the decision below is exclusively the province of Congress. This Court has consistently deferred to the expertise and wisdom of Congress in this area and should do so in the present case.

The Fifth Circuit reached an unjustified conclusion when it characterized platforms in general as wharves without regard to the particular operational function of the structure, without regard to its size, without regard to the presence or absence of boat landings on a particular structure, and totally without evidence as to the claimant's actual situs at the time of his injury or what activity was normally conducted on that structure. To make such a finding without evidence constitutes taking judicial notice of adjudicative facts which are indeed in dispute.

The decision rendered by the Fifth Circuit herein cannot be reconciled with its own prior decisions and controlling precedent of the United States Supreme Court, holding that artificial islands devoted to the production of hydrocarbon resources are not inherently maritime in nature and that the process of producing hydrocarbons from beneath navigable waters is not maritime activity. The holding that this claimant is an employee within the coverage of the Act and that he was working on a situs covered by the Act is in direct conflict with substantial prior authority to the contrary.

Amici Curiae suggest to this Court that the Fifth Circuit's opinion portends a virtually unmanageable onset of claims for benefits under the LHWCA by employees and other workes injured on fixed structures in territorial waters subsequent to 1972. The time in which the Act permits claims to be filed does not commence running until a report is filed in the Office of Workers' Compensation programs. Reports have not been filed for workers on inland structures who are not engaged in cargo operations or vessel repair activity in the belief that they were subject to the appropriate state compensation act rather than LHWCA. As a consequence, a potential ten-year log jam of claims, including many where state benefits have been, and continue to be paid, could be created if the Fifth Circuit's decision is allowed to stand.

ARGUMENT

THE PANEL'S EXTENSION OF MARITIME SITUS TO INCLUDE FIXED PLATFORMS ON STATE WATERS CANNOT BE JUSTIFIED IN LAW OR IN FACT

The Fifth Circuit panel below opted, simply on its

own volition, to formulate an entirely new basis for awarding benefits under the Longshoremen's and Harbor Workers' Compensation Act.[1] (Hereinafter LHWCA) Without citing any authority other than misstating a passing reference made by this Court,[2] which arose in a totally inapposite factual and legal setting, the decision below attempts to bring countless numbers of previously uncovered oilfield workers under the ambit of the act. The Court of Appeals proceeded to accomplish this by holding, for the first time, that fixed platforms in state waters meet the situs requirements of the LHWCA simply because they are "like" wharves. This bold action apparently was taken to remedy what the Court perceived as "...a curious hole in Longshoremen's and Harbor Workers' Compensation Act coverage".[3] Amici Curiae contend that such a far reaching decision should not be left to the judicial fiat of an intermediate appellate court, but more appropriately, should be reserved for Congress.[4]

This case reached the Fifth Circuit on appeal from the Benefits Review Board which had held that claimant Gray was entitled to benefits as an employee covered under the Outer Continental Shelf Lands Act,[5] (hereinafter OCSLA), not the LHWCA.[6] No distinction is made in the appellate opinion as to the function of various structures found in inland waters, such as drilling platforms,

---

[1] 33 U.S.C. §900 *et seq.*

[2] 395 U.S. 353 (1969).

[3] 703 F.2d 178.

[4] *Nacirema Operating Company v. Johnson*, 396 U.S. 212 (1969).

[5] 43 U.S.C. §1333 *et seq.*

[6] 33 U.S.C. §900 *et seq.*

production platforms, well jackets, tank batteries, compressor stations, and quarters structures. No consideration can be given on the record as it stands as to the size of the platform, whether it had a boat landing, or whether Gray's activities had anything to do with loading or unloading boats. These questions were not considered by the Board, as they were not relevant to determining coverage under the OCSLA. Consequently, there is no evidence which could support the Fifth Circuit's conclusion that a fixed platform should be treated as if it were a wharf adjoining navigable waters. Thus, the panel's declaration that, "Such platforms are essential to and customarily used in the loading and unloading of crews, supplies and oil. Their function is precisely that of wharves over navigable waters",[7] cannot be substantiated by the record that was before the Court. It is apparent that the Fifth Circuit simply formulated an entirely new basis for awarding benefits to the claimant by misconstructing this Court's earlier decision in *Rodrigue*[8] to enisle fixed platforms on navigable waters.

Although the Court of Appeals purportedly recognized[9] that *Rodrigue*[10] mandates that fixed platforms be treated as islands,[11] it nonetheless ignored the rationale behind this Court's holding, *i.e.* "...that maritime

---

[7] 703 F.2d 178.

[8] *Rodrigue v. Aetna Casualty and Surety Company*, 395 U.S. 353 (1969).

[9] 703 F.2d at 179.

[10] 395 U.S. 353.

[11] *Id.* at 361.

law was inapposite to these fixed structures",[12] when it analogized fixed platforms to wharves. In reaching this decision, the Court of Appeals theorized that because this Court "likened"[13] fixed platforms to wharves in *Rodrigue* and since wharves were not covered under the Longshoreman and Harbor Workers' Compensation Act at the time of the *Rodrigue* decision, but as a result of the 1972 Amendments, wharves are presently covered under the Act, fixed platforms "likened" to wharves should likewise be covered siti at present. This analysis is flawed in several respects. First, *Rodrigue* was not concerned with the issue of Longshoreman of Harbor Workers' Compensation Act coverage, but rather with the issue of whether there was admiralty jurisdiction over fixed platforms, which the court answered in the negative. Secondly, it was within this limited context that the Court briefly mentioned wharves simply as illustrative of the non-applicability of admiralty jurisdiction principles to fixed platforms. Finally, contrary to the Fifth Circuit's analysis, this Court never likened fixed platforms to wharves, nor did it even infer that such a comparison could be drawn. The exact language of this Court wherein the word wharfs was mentioned is as follows:

> At a minimum, the legislative history shows that accidents on these structures, which under maritime principles would be no more under maritime jurisdiction than accidents on a wharf located above navigable waters, were not changed in character by the Lands Act.[14]

---

[12] *Id.* at 363.

[13] 703 F.2d at 177.

[14] 395 U.S. at 366.

With all due respect to the Court of Appeals, this Court left no doubt whatsoever that fixed platforms were to be treated as islands and nothing more or nothing less.[15] The Fifth Circuit's reliance on *Rodrigue* as precedent for analogizing fixed platforms to wharves therefore is entirely misplaced. To recharacterize the essential nature of these structures merely because the 1972 Amendments of the L.H.W.C.A. were "expansive in nature" is untenable. The Fifth Circuit's analysis, built as it is upon such a tenuous foundation, should not be left to stand by this Court.

Even if the Fifth Circuit's sidestepping of the *Rodrigue* classification of fixed platforms as artificial islands is upheld, its statement that "...the jurisprudential concept of an island carries with it the concept of the island's shore and the function of the structure as a wharf projects from that 'land' "[16], concedes that the same concept necessarily requires that a distinction be made between the portions of the platform designated as the "wharf area" and the portions of the platform designated as "the island". Even assuming arguendo that some portion of a fixed platform can be likened to a "wharf", there is no evidence from which the Fifth Circuit could decide whether plaintiff was injured on the "wharf" portion of the fixed platform or the "island" portion of the fixed platform. There is nothing in the record which indicates either that the area of the platform where plaintiff was injured was used for loading and unloading, or that the entire platform, or *any part* of the platform was so used. Accordingly, the Court's finding that coverage existed under the LHWCA was predicated on a record barren of supportive evidence and should not be affirmed by this Court.

---

[15] *Id.* at 352, 360.

[16] 703 at 178.

THE EXPANSION OF STATUS UNDER THE LHWCA WITHOUT CONGRESSIONAL AUTHORIZATION CANNOT BE SUPPORTED

It is the contention of Amici Curiae that the Fifth Circuit's opinion is an attempt to correct what it perceived to be congressional error. After briefly reviewing the Supreme Court decision in *Rodrigue*,[17] and the coverage provision of the 1972 Amendments to the Longshoreman and Harbor Workers' Compensation Act, the Court commented: "...it would be incongruous, therefore, not to extend LHWCA jurisdiction to the fixed platform in this case."[18] Shortly thereafter, it expressed the view that, "to bar from the acts coverage all fixed platform workers in the territorial waters would create a curious hole in LHWCA coverage. We decline to do it."[19] Still later in the opinion, the Court acknowledged that this case is distinguishable from *Director, Office of Workmens' Compensation v. Perini North River Associates*[20] when it stated that the claimant is "not within the group of workers traditionally covered prior to 1972".[21] Obviously, fixed platforms were not a covered situs under the pre-1972 Amendments Act, and therefore, the rationale of *Perini* is inapplicable to this case.

Whether a difference in applicable compensation regimes between oilfield workers on the Outer Continental Shelf and those doing similar work on artificial islands in

---

[17] 395 U.S. 352 (1969).

[18] 703 at 178.

[19] *Id.*

[20] 459 U.S. 297, 103 S.Ct. 634 (1983).

[21] *Id.* at 179.

state waters is truly an incongruity, or whether that distinction is anomalous, are not issues which an intermediate Court of Appeals is empowered to redress. The geographical contour of coverage under the Act, with whatever incongruities, anomalies, or curiosities are included, is solely a matter for Congress to determine.[22] The reasoning espoused by this Court in *Victory Carriers, Inc. v. Law*,[23] applies with equal weight to this case. There, the suggestion was made that there should be coverage to workmen on wharves because they were doing essentially the same work that their co-workers were doing in the holds of ships only a short distance away. This Court answered that contention by declaring:

> ...Congress might well prefer not to extend the jurisdiction of the federal courts. On the other hand, if denying federal remedies to longshoreman injured on land is intolerable, Congress has ample power under Arts. I and II of the Constitution to enact a suitable solution.

This reasoning applies with equal weight to this case. Nothing in the specific provisions, or legislative history of the 1972 Amendments to LHWCA has been cited to support a finding of Congressional intent to extend coverage of the Act to oilfield workers in general. There is ample authority, however, to the contrary.[24]

In terms of coverage, the amendments did no more

---

[22] *Nacirema Operating Co. v. Johnson*, 396 U.S. 212 (1969).

[23] 404 U.S. 202 (1971).

[24] *See, Bible v. Chevron Oil Co.*, 460 F.2d 1218 (5th Cir. 1972); *Gray v. Chevron Oil Co.*, 631 F.2d 1263 (5th Cir. 1980), 644 F.2d 540 (5th Cir. 1981).

than to extend landward the Act's coverage to those structures adjoining navigable waters which are "customaarily used by an employer in loading, unloading, repairing, or building a vessel."[25] The facts offered to support the Court of Appeals' reasoning, that the 1972 Amendments expanded coverage of the Act, that Congress had adopted the Act by reference in the OCSLA, that workers covered under the pure situs test prior to 1972 were not disenfranchised by the status test added by the amendments, and that the Act is to be interpreted liberally, do not, singly or collectively, give the Circuit Court the power to add oilfield workers to the coverage not specifically included by the language of the Act.

As the legislative history makes clear, Congress itself intended to make distinctions which would not survive the reasoning process employed by the Fifth Circuit in this case. The House Committee pointed out a distinction in coverage for employees doing clerical work as cargo checkers but not for those doing other clerical work for the same stevedore. The Committee also suggested a distinction in coverage between employees who handled cargo for transshipment from storage and those who placed it in storage from the vessel.[26] Certainly, those engaged in transshipment handling are no less "an integral part" of maritime commerce and are just as essential and indispensible to the furtherance of the cargo handling as the longshoremen who attach the slings in the hold of the ship.[27] Judicial extension of coverage determined by

[25] 33 U.S.C. §903(a).

[26] House Report 92-1441, 1972 U.S. Code Cong. & Admin. News 4698, 4708.

[27] 730 F.2d at 180.

comparing the contribution to the total endeavor of workers seeking to be added to coverage with that of workers clearly within the scope of the Act was specifically rejected in *Nacirema Operating Co. v. Johnson*.[28] For coverage to exist, it must be found specifically within the Act.

The Court of Appeals began its comparative analysis with the observation that, "Today, accidents upon wharves over navigable waters are within the statutory jurisdiction of LHWCA".[29] That statement is inaccurate; today, *some* accidents on wharves are covered by LHWCA. Some are not. There are two errors in the Fifth Circuit's reasoning process: (1) it engages in shaping coverage to please its own eye for symetry by (2) looking to the utility of the employee's contribution rather than questioning carefully whether it should be treated as maritime employment.[30] Many, if not most, employees in producing companies are just as necessary for recovery and sale of petroleum as a platform maintenance worker like claimant Gray, including refinery workers and service station employees, and therefore, could be covered employees under the Court's utility analysis if they were injured on a covered situs. The Court's emphasis on the utility of Gray's work neglects to focus on any differentiation between maritime and non-maritime employment, which should be the controlling consideration for finding maritime status.[31] The essential question here is whether maintenance work on an island has a significant relationship to traditional maritime activity involving navigation and commerce on

[28] 396 U.S. 212 (1969).

[29] *Id.* at 177-178.

[30] *See Id.* at 179.

[31] *Odom Construction Co. v. United States Dep't of Labor*, 622 F.2d 110 (5th Cir. 1980).

navigable waters. The answer must be negative, when the inapplicable notions of congruity and utility applied by the Fifth Circuit below are set aside.

NEITHER ARTIFICIAL ISLANDS NOR HYDROCARBON PRODUCTION ACTIVITIES ON THEM ARE INHERENTLY MARITIME

The Fifth Circuit reasons that claimant, Gray, is an employee covered by the LHWCA because the platform on which he was working functions as a wharf on navigable waters in the production of petroleum and other hydrocarbons from beneath the seabed, which function the Court perceives to be dedicated to the furtherance of maritime commerce. The Court of Appeals relied on *Pippen v. Shell Oil Co.*,[32] to find that the activity of producing hydrocarbon from beneath the seabed is maritime commerce. Pippen was injured on a vessel during the course of his employment and therefore, was in that group of workers traditionally covered by LHWCA before 1972. Thus, the Fifth Circuit's seminal finding that the production of oil and gas from the bed of navigable waters constitutes maritime commerce was purely gratuitous and unnecessary to its final decision. Further, the *Pippen* decision did not cite any legal authority for such a conclusion.

This concept was carried forward by the same Court in *Boudreaux v. American Workover, Inc.*[33] However, in that decision, Judge Gee pointed out in an eloquent dissent that a finding that "...drilling for and producing oil and gas from the inland seas has become—in and of itself—a part of maritime commerce or navigation so that all parties working

[32] 661 F.2d 378 (5th Cir. 1971).

[33] 664 F.2d 463 (5th Cir. 1981).

in connection with it are maritime employees" is simply beyond the scope of the intermediate appellate court's powers.[34] As stated by Judge Gee:

> "...and the third constitutes a giant legislative step, appropriate for the Congress but scarcely, in my view, for an intermediate appellate court. As to this last, there is little that I can say, since my difference with the majority apparently goes to our differing basic conceptions of the judicial function. If it were appropriate for us, and within our assigned powers, to extend LHWCA coverage to an entire industry because we think that extension wise or just, then my debate with my brothers in the majority would be one about prudence and economic policy. Since, however, I think formation of such major policy more appropriate to the Congress than to nonelective judges, I decline to embark on such a contest. The Supreme Court has consistently deferred to the expertise and wisdom of Congress in this area. In *Nacirema Operating Co. v. Johnson*, 396 U.S. 212, 224, 90 S.Ct. 347, 354, 24 L.Ed.2d 371 (1969), the Court declared that "[t]he invitation to move [the Jensen] line must be addressed to Congress, not to this Court." The Court reiterated this principle in *P. C. Pfeiffer Co. v. Ford*, 444 U.S. 69, 73, 100 S.Ct. 328, 332, 62 L.Ed.2d 225 (1979). When the Congress wished to effect the last such massive extension of LHWCA coverage, one to the Outer Continental Shelf, it knew how to do so. Following *Pippen*, we do so ourselves today in a comparable area, without benefit of legislative process—no committee hearings, no balancing of risks and economic considerations, no open debate, and no submission to the executive for signature or veto—on the basis of a chain of deductive reasoning. I would not do so.

[34] *Id.* at 470.

As it has consistently done in the past, this Court should again defer to the legislature on such an enormous broadening of the Acts coverage.

In any event, the authority of *Pippen* has been rendered moot by the subsequent decision of the Supreme Court in *Director v. Perini North River Assoc.*[35] In *Perini*, the Court held that workers such as Pippen were covered by the Act, if they met the situs test which controlled coverage prior to the 1972 Amendments. Since Pippen worked on a vessel and would have been covered prior to 1972. the holding of *Perini* suggests at least that the *Pippen* statement lacks authority.[36]

In *Sohyde Drilling & Marine Co. v. Coastal States Gas Producing Co.*,[37] the Fifth Circuit considered the applicability of maritime jurisdiction to a claim arising out of the blowout of a gas well being re-worked. In discussing the factors to be considered in the context of jurisdiction, the Court specifically held that the functions of the parties, the well owner and the drilling contractor, were "hardly of a peculiarly maritime nature."[38] The Court also held that the blowout in a canal slip dredged for the well location did not fall within the traditional concept of admiralty and maritime relationships.[39] If drilling or reworking a well in *Sohyde* is not a maritime activity when being performed from a drill barge, how can the same Circuit declare in this

[35] 459 U.S. 297, 103 S.Ct. 634, __ L.Ed.2d __ (1983).

[36] See, also, *St. Julien v. Diamond M Drilling Co.*, 403 F.Supp. 1256 (E.D.La. 1975).

[37] 644 F.2d 1132 (5th Cir. 1981).

[38] 644 F.2d at 1136.

[39] 644 F.2d at 1138.

case that "the discovery, recovery, and sale of oil and natural gas from the sea bottom...is maritime commerce?" To be sure, *Pippen* sought to distinguish *Sohyde* because the *Sohyde* court was considering whether the blowout bore a significant relationship to maritime activity and not whether work activity at the time of an injury bore a significant relationship to maritime activity. The fact remains, however, that the Court in this case, relying on *Pippen*, has declared that the production of hydrocarbons from the seabed is maritime activity, while in *Sohyde* the Court said it is not. There is an essential, irreconcilable conflict in these two points of view. Amici submit that *Sohyde* constitutes the better reasoned view.

This Court should take notice of the fact that this claimant previously pursued tort damages arising from the same accident for which he now seeks compensation benefits.[40] He lost the claim when the Fifth Circuit affirmed a summary judgment in favor of the defendant based on the authority of *Blanchard v. Engine & Gas Compressor Serv., Inc.*[41] The *Blanchard* case, applied particular provisions of the LHWCA to claims arising on fixed structures in state territorial waters. The Fifth Circuit's opinion now broadly suggests that dismissal of Gray's tort claim was inappropriate and that the *Blanchard* case went through two appellate opinions and a certification to the Louisiana Supreme Court all on a misconception as to which compensation regime would apply to the fixed structures involved.

This Court should recognize that the decision below is a sharp departure from basic approaches to the rights and responsibilities of employers and employees engaged

[40] *Gray v. Chevron Oil Co.*, 644 F.2d 540 (5th Cir. 1981).

[41] 613 F.2d 65 (5th Cir. 1980).

in oil industry activity within the state. The conclusion that production of minerals from the seabed constitutes "maritime commerce" and that work being performed by those so engaged is maritime employment cannot be substantiated by anything in the *Pippen or Boudreaux* opinions, nor by the most recent decision of this Court, *Thornton v. Brown and Root.*[42] No factual or legal basis for such a conclusion is offered by this case, nor the above cited opinions. Accordingly, there is nothing maritime about the work plaintiff was performing at the time of his injury and he should not come within the coverage of the LHWCA.

THE PANEL DECISION WOULD INVITE THE FILING OF AN OVERWHELMING NUMBER OF CLAIMS

The time limitation for filing a claim under LHWCA is keyed to the reporting of an injury by the employer. A claim can be filed at any time within one year following the report.[43] Amici Curiae suggest that most employers engaged in operations on fixed structures not on the Outer Continental Shelf have not reported injuries on those structures to the Department of Labor in the belief that the appropriate state workmen's compensation statute was applicable to them. If the Fifth Circuit's decision is given retrospective effect, there is a ten-year volume of claims which could be presented to the Department of Labor. Such a development would create a variety of problems associated with the number of claims, the age of those claims, the prior handling of them as state compensation matters, and the inevitable interference with orderly administration of current claims.

---

[42] 707 F.2d 179 (5th Cir. 1983).

[43] 33 U.S.C. §903.

Any question as to retrospective application left open in this decision would not likely be answered for several years. The question would have to pass through administrative handling in the Office of Workmen's Compensation Programs, hearing and decision by an administrative law judge, and consideration by the Benefits Review Board before reaching the Fifth Circuit for an authoritative ruling. The age of this claim at this stage of proceedings is a fair indication of what time will pass before the question is finally answered. In the meantime, the disrupting effect of the opinion below will have been experienced by the administrators of LHWCA, employers, and carriers.

CONCLUSION

Amici Curiae submit that the opinion of the Fifth Circuit herein reaches a conclusion which is contrary to Congressional intent as expressed in the 1972 Amendments to the Longshoreman's and Harbor Workers' Compensation Act, to prior opinions of the same circuit court of appeals, and to controlling decisions of this Court. The Fifth Circuit's decision is nothing less than a determination to greatly expand the coverage of the LHWCA for reasons which are not relevant to the controlling legal question and which are based on factually unsupported findings concerning the nature of structures in territorial waters. The massive expansion of LHWCA coverage undertaken by the Fifth Circuit should have been reserved to Congress. The opinion below should therefore be reversed by this Court.

Respectfully submitted,

ROBERT M. CONTOIS, JR.
GEORGE R. ALVEY, JR.
Jones, Walker, Waechter, Poitevent,
Carrere & Denegre
225 Baronne Street-28th Floor
New Orleans, Louisiana 70112
Telephone: (504) 581-6641

ATTORNEYS FOR AMICI CURIAE,
TEXACO, INC.
GULF OIL CORPORATION, AND
AMOCO PRODUCTION COMPANY,
U.S.A.

CERTIFICATE OF SERVICE

I hereby certify that three (3) copies of the above and foregoing have been served on all parties required to be served by placing same in the United States Mail, postage prepaid on this the 2nd Day of May, 1984.

ROBERT M. CONTOIS, JR.
GEORGE R. ALVEY, JR.
Jones, Walker, Waechter, Poitevent,
Carrere & Denegre
225 Baronne Street-28th Floor
New Orleans, Louisiana 70112
Telephone: (504) 581-6641

Office - Supreme Court, U.S.
FILED
JUN 9 1984
ALEXANDER L. STEVAS
CLERK

NO. 83-728

In the Supreme Court of the United States

OCTOBER TERM, 1983

HERB'S WELDING, INC. and
UNITED STATES FIDELITY & GUARANTY CO.,

Petitioner

VERSUS

ROBERT H. GRAY,

Respondent

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

ORIGINAL BRIEF ON THE MERITS ON BEHALF OF ROBERT H. GRAY, RESPONDENT HEREIN

T. GERALD HENDERSON
730 MURRAY STREET
ALEXANDRIA, LOUISIANA 71301
TELEPHONE (318) 487-9343

DAVID W. ROBERTSON
727 EAST 26TH STREET
AUSTIN, TEXAS 78705

ATTORNEYS FOR RESPONDENT

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

BEST AVAILABLE COPY

21 pp

TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS i
TABLE OF AUTHORITIES ii
SUMMARY OF ARGUMENT 1
ARGUMENT 3
CONCLUSION 15
CERTIFICATE OF SERVICE 17

TABLE OF AUTHORITIES

CASES: **PAGE**

Boudreaux v. American Workover, Inc.,
664 F.2d 463 (5th Cir. 1981), *rehearing en banc*,
680 F.2d 1034 (5th Cir. 1982), *cert. denied*,
__ U.S. __, 103 S.Ct. 815 (1983) 10, 15

Chevron Oil Co. v. Huson,
404 U.S. 97, 92 S.Ct. 349 (1971) 10

Davis v. Department of Labor,
317 U.S. 249, 63 S.Ct. 225 (1942) 8

Director, Etc. v. Perini North River Associates,
__ U.S. __, 103 S.Ct. 634 (1983) 8, 9, 10, 14

Executive Jet Aviation, Inc. v. City of Cleveland,
404 U.S. 249, 93 S.Ct. 493 (1972) 13, 14

Foremost Insurance Co. v. Richardson,
__ U.S. __, 102 S.Ct. 2654 (1982) 13, 14

Henning v. Vacco Wireline Services,
2 BRBS 87 (1975) 6

Nacirema Co. v. Johnson,
396 U.S. 212, 90 S.Ct. 347 (1969) 13, 15

Neal v. Wilson Wireline Services,
2 BRBS 688 (1975) 6

Northeast Marine Terminal Co., Inc. v. Caputo,
432 U.S. 249, 97 S.Ct. 2348 (1977) 5, 6, 9

P. C. Pfeiffer Co., Inc. v. Ford,
444 U.S. 69, 100 S.Ct. 328 (1980) 5, 6

Parker v. Motor Boat Sales, Inc.,
314 U.S. 144, 62 S.Ct. 221 (1941) 8, 9

Pennsylvania Railroad Co. v. O'Rourke,
344 U.S. 334, 73 S.Ct. 302 (1953) 8, 9

Pippen v. Shell Oil Co.,
661 F.2d 378 (5th Cir. 1981) 10, 11, 12

Rodrigue v. Aetna Cas. & Sur. Co.,
395 U.S. 352, 89 S.Ct. 1835
(1969) 2, 5, 11, 12, 13, 14

Smith v. Pan Air Corp.,
684 F.2d 1102 (5th Cir. 1982) 14

Thornton v. Brown & Root, Inc.,
707 F.2d 149 (5th Cir. 1982) 10

Victory Carriers, Inc. v. Law,
404 U.S. 202, 92 S.Ct. 418 (1971) 13, 15

Wiley v. Wilson Wireline Services,
2 BRBS 86 (1975) 6

STATUTES:

28 U.S.C. §1333 14
33 U.S.C. §902(3) 7, 8, 9, 11
33 U.S.C. §903(a) 4, 14
43 U.S.C. §1333(b) 2, 3

OTHER AUTHORITIES:

Insurance Advocate 11
U:S. Code Cong. & Admin. News 1972, p. 4708 14

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

HERB'S WELDING, INC. and
UNITED STATES FIDELITY & GUARANTY CO.,

Petitioner

VERSUS

ROBERT H. GRAY,

Respondent

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

ORIGINAL BRIEF ON THE MERITS ON BEHALF OF ROBERT H. GRAY, RESPONDENT HEREIN

MAY IT PLEASE THE COURT:

This is the original brief on the merits on behalf of Robert H. Gray, respondent herein.

SUMMARY OF ARGUMENT

Respondent is entitled to benefits under the Longshoremen's Act by direct application or through the provisions of the Outer Continental Shelf Lands Act (OCSLA).

Since respondent was engaged in employment requiring the maintenance of pipelines carrying oil and gas from the outer Continental Shelf and was injured as a result of those activities, he is squarely covered under the provisions of 43 U.S.C. §1333(b), as found by the Benefits Review Board (Board).

At the time of the accident, Gray was aboard a fixed platform in the Gulf of Mexico slightly landward of the imaginary line separating the outer Continental Shelf from State Waters. This platform and others like it in the Bay Marchand field were customarily used to load and unload Gray and his equipment. Of course, the platform also adjoined navigable water. On the reasoning of the Court's previous decisions and because of the obvious, respondent submits that a fixed oil and gas production platform in the Gulf of Mexico is a covered situs.

Respondent also meets the status requirement of the act because his employment involving the discovery and recovery of oil and gas from the sea bottom is maritime commerce. Gray was transported in the oil field by ships and seaplanes, worked with minerals of the sea and routinely faced the hazards of the sea. To except Gray from Longshoremen's coverage would defeat the Congressional purpose of a rational and liberal construction since Gray cannot be distinguished from other marine petroleum workers presently covered.

The case of *Rodrigue v. Aetna Cas. & Surety Co.*, 395 U.S. 352, 89 S.Ct. 1835 (1969), as it concerns the application of admiralty tort jurisdiction, is not relevant here, not only because of the abandonment of the strict use of the locality test, but because the jurisdictional statutes involved have different histories and interpretations.

ARGUMENT

I. GRAY IS ENTITLED TO LONGSHOREMEN'S ACT BENEFITS BY VIRTUE OF THE PROVISIONS OF THE OUTER CONTINENTAL SHELF LANDS ACT

The Benefits Review Board held that Gray's injury was covered by the Outer Continental Shelf Lands Act (OCSLA) provision making the Longshoremen's and Harbor Workers' Compensation Act the applicable workers' compensation statute for injuries resulting from mineral operations on the outer Continental Shelf. As presently worded, that provision, 43 U.S.C. §1333(b), provides:

> With respect to disability or death of an employee resulting from any injury occurring as the result of operations conducted on the outer Continental Shelf for the purpose of exploring for, developing, removing, or transporting by pipeline, the natural resources, or involving rights to the natural resources, of the subsoil and seabed of the outer Continental Shelf, compensation shall be payable under the provisions of the Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C.A. §901 et seq.)

The Board found that Gray's injury was "the result of operations conducted on the outer Continental Shelf" though the platform on which he was hurt was located on the Louisiana side of the 3-mile line, stating:

> Evidence was adduced at the hearing that established that claimant's work was performed both in territorial waters and on the outer Continental Shelf, in fact, claimant estimated that approximately 25 percent of his time was spent aboard the K and M platforms located on the

outer Continental Shelf. Moreover, the platform on which claimant was injured was fed by a gas flow line that extended out to the outer Continental Shelf. Finally, the operations conducted by employer were located on both sides of the three-mile line of demarcation.

Insofar as claimant's employment as a maintenance welder is integrally related to the operations enumerated in Section 1333 of the OCSLA, and insofar as his injury was incurred as a result of such activity, we hold that claimant has established coverage under the Act. (A-26)

In the decision below, the Fifth Circuit Court of Appeals did not reach the issue of Longshoremen's Act benefits via the OCSLA coverage provision, instead resting its affirmance of the Benefits Review Board on the view that the Longshoremen's Act provides coverage of its own force. However, the OCSLA does provide an alternative basis for affirming the result below. The Board found that facts presented at the administrative law judge hearing showed that Gray's injury occurred as the result of OCS operations, bringing him squarely within the OCSLA language. In that connection, it should be noted that Petitioners' Original Brief to this Court, p. 4 n.2, is quite misleading in stating that "by its very terms" the OCSLA does not apply here. By its very terms and on the Benefits Review Board's findings, it does apply.

II. GRAY'S INJURY OCCURRED ON A SITUS COVERED BY THE LONGSHOREMEN'S ACT

The Longshoremen's Act covers injuries:

occuring upon the navigable waters of the United States (including any adjoining pier, wharf, dry

dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel). 33 U.S.C. §903(a).

The Court below found that fixed offshore platforms "are essential to and customarily used in the loading and unloading of crews, supplies and oil." This conclusion meant that the platform was a covered situs under the quoted provision of the Longshoremen's Act. The Court below buttressed its "situs" conclusion by reliance on language from this Court's decision in *Rodrigue v. Aetna Casualty and Surety Company*, 395 U.S. at 352, (1969), likening fixed platforms to "piers," 395 U.S. at 360, and to "wharves." 395 U.S. at 366.

This Court has had little occasion to consider the Longshoremen's Act situs issue. *Northeast Marine Terminal Co., Inc. v. Caputo*, 432 U.S. 249 (1977), involved two claimants, Caputo and Bludno. Caputo was hurt while rolling a dolly into consignee's truck parked at a terminal facility. This Court stated that situs was properly conceded by the employer, on the view that the entire terminal was the relevant area, it adjoined navigable water, and part of it—though not the part where Caputo was working—was used for loading and unloading ships. 432 U.S. at 279. Bludno was hurt while stripping a container on a finger pier that was not used for loading and unloading ships, but only for stripping and stuffing containers and for storage. This Court stated the employer's situs argument did not merit extended discussion, because probably a pier is qualified whether or not it is used for loading and unloading, 432 U.S. at 280, and in any event parts of the terminal area where Bludno was working were used for loading and unloading ships, 432 U.S. at 281.

In the case of *P. C. Pfeiffer Co., Inc. v. Ford*, 444 U.S. 69 (1979), also involving two claimants, Ford was hurt

fastening motor vehicles onto railroad flatcars. Bryant's injury occurred while he was moving a bale of cotton in a pier warehouse. Situs was conceded as to both claimants, 444 U.S. at 76 n. 6, because the entire terminal area where each claimant worked adjoined navigable water and part of each terminal—though not the part where either claimant worked—was used in loading and unloading ships.

On the reasoning of *Caputo* and *P. C. Pfeiffer,* the platform on which Gray was hurt was a covered situs because it adjoins navigable water and because part of it was customarily used in loading and unloading ships.

The Court below recognized the reality of the offshore oilfield. No "mental gymnastics"[1] or "bold action"[2] are needed to conclude that the platforms on which Gray worked were customarily used to load and unload equipment and crews. Aside from the obvious, the work records introduced into evidence before the Administrative Law Judge document hundreds of boardings from ships and seaplanes to various platforms in the Bay Marchand field by Gray and the loading of his welding equipment. (A __)

The only jurisprudence on the specific question whether a fixed offshore platform is a covered situs consists of several administrative law judge decisions, all of which concluded affirmatively. *Neal v. Wilson Wireline Services,* 2 BRBS 88 (1975); *Henning v. Vacco Wireline Services,* 2 BRBS 87 (1975); *Wiley v. Wilson Services,* 2 BRBS 86 (1975).

In light of this Court's decisions in *Caputo* and *Pfeiffer, supra,* and the administrative law judge decisions cited,

[1] Petitioners' Original Brief p. 16 n. 16

[2] Brief of Amici Curiae p. 4

respondent respectfully submits that the situs issue is not a serious issue in this case: clearly the fixed platform on which Gray was hurt was either a pier or wharf by analogy and/or an "adjoining area (adjoining navigable water) (parts of which were) customarily used...in loading, unloading...a vessel."

III. GRAY MEETS THE STATUS REQUIREMENT OF THE LONGSHOREMEN'S ACT

The Longshoremen's Act covers injuries to an "employee," defined in section 2(3) as

> any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker.....
>
> 33 U.S.C. §902(3).

The Court below concluded that Gray was engaged in "maritime employment," reasoning as follows:

> Gray did welding and maintenance work on offshore platforms. At the time of his injury, he was welding gas lines. His work was necessary for the offshore drilling process in that gas line maintenance is vital to the drilling and removal of gas and oil. Offshore drilling—the discovery, recovery and sale of oil and natural gas from the sea bottom—is maritime commerce. *Pippen v. Shell Oil Co.*, 661 F.2d 378, 384 (5th Cir. 1981). Since Gray's work was a central part of that process, it obviously facilitated maritime commerce. Indeed, his work was 'an integral part' of maritime commerce, 'an essential and indispensable step' in the offshore drilling process. *Hullinghorst Industries v. Carroll,* 650 F.2d 750, 756 (5th Cir. 1980), cert. denied, 454 U.S. 1163 (1982). He was clearly employed in maritime employment....

The first step in validating the reasoning of the Court below is to establish that the section 2(3) Longshoremen's Act listing of categories of maritime employment—longshoring, shipbuilding, ship repair, ship breaking—is illustrative and not exhaustive. This Court's decision in *Director, Etc. v. Perini North River Associates*, __ U.S. __, 103 S.Ct. 634 (1983), supplies that step. Holding that worker injured in the course of their employment on actual navigable waters who would have been covered by the pre-1972 Longshoremen's Act are covered by the present Act, this Court stated that while there had been no previous occasion to consider the content of the "maritime employment" language of 2(3) outside the listed categories of longshoring, etc., "we do not maintain that landward coverage could never be determined by reference to anything but the explicitly enumerated categories of activities in the section 2(3) definition of 'employee'..." 103 S.Ct. at 648 n. 27. The *Perini* opinion found that several of the pre-1972 decisions in fact established that activities other than those enumerated in 2(3) qualify as "maritime employment" under the Act. *Parker v. Motor Boat Sales, Inc.*, 314 U.S. 144 (1941) held that a janitor employed by a small boat seller who drowned while riding in one of the employer's motor boats was entitled to Longshoremen's Act benefits because he was injured while engaged in maritime employment. 103 S.Ct. at 644. *Davis v. Department of Labor*, 317 U.S. 149 (1942), held on "twilight zone" reasoning that an employee injured while dismantling a bridge from a standing position on a barge was entitled to state workers' compensation, but the decision plainly implies and the commentators agree that the *Davis* claimant would have been entitled to Longshoremen's Act benefits. 103 S.Ct. at 644-45. nn. 20 and 21. *Pennsylvania Railroad Co. v. O'Rourke*, 344 U.S. 334 (1953) held that a railway brakeman, removing railroad cars from a car float by the

use of an ordinary switch engine, was engaged in maritime employment and was covered by the Longshoremen's Act. 103 S.Ct. at 645, n. 21.

A major point in *Perini* was that the employees' activities in *Parker, Davis* and *Pennsylvania Railroad* qualified as "maritime employment" because the injury occurred on actual navigable water. However, the *Perini* decision does show that the section 2(3) listing of categories of maritime employment is illustrative rather than exhaustive. Indeed, the *Perini* dissenter's major quarrel with the majority centered on that feature of the decision:

> The term 'maritime employment' expressly includes two important subcategories, both of which are defined with reasonable clarity. The question of construction that is presented is what, if any, additional categories of employment are included within the term 'maritime employment'. There are several independent reasons for not giving the term an expansive, essentially open ended reading.

The *Perini* case is also pertinent to the present inquiry in two additional respects. First, the Court reiterated that questions of Longshoremen's Act coverage are informed by a principle of liberal construction: "This Act must be liberally construed in conformance with its purpose, and in a way which avoids harsh and incongruous results." 103 S.Ct. at 647. (The same policy was stated in *Caputo, supra*, 432 U.S. at 268.) The Court below noted that an extremely harsh and incongruent result would flow from denying coverage to Gray:

> Workers injured on movable drilling barges are covered... Workers injured on fixed platforms located upon the Outer Continental Shelf receive LHWCA coverage through the Outer Continental

> Shelf Lands Act. Workers en route to fixed platforms are granted coverage.***To bar from the Act's coverage all fixed-platform workers in territorial waters would create a curious hole in LHWCA coverage.

The other relevant feature of *Perini* is its repeated stress on the intention of Congress in enacting the 1972 Longshoremen's Act amendments to ensure that there would be coverage for workers who regularly move in the course of their work from (pre-1972) covered to uncovered areas. (See e.g., 103 S.Ct. at 647, n. 26, quoting the Senate and House Committee reports, see also 103 S.Ct. at 648, n. 27.) Gray, the present claimant, regularly moved from work in the part of his employer's field located in Louisiana waters to work in the part located on the outer Continental Shelf. Hence, under any construction other than the one adopted by the Court below, he would regularly move in and out of coverage, a result the 1972 Congress was concerned to prevent.

The remaining step to validation of the status reasoning of the Court below is supporting the plausibility of construing offshore oil and gas activity as maritime commerce. In at least four decisions, the Fifth Circuit Court of Appeals has so held. In addition to the instant case, see *Thornton v. Brown & root, Inc.*, 707 F.2d 149 (5th Cir. 1983), *Boudreaux v. American Workover, Inc.*, 664 f.2d 463 (5th Cir. 1981), *rehearing en banc*, 680 F.2d 1034 (5th Cir. 1982), *cert. denied*, __ U.S. __, 108 S.Ct. 815 (1983); *Pippen v. Shell Oil Co.*, 661 F.2d 378 (5th Cir. 1981). In *Thornton*, Judge Brown (whom this Court has referred to as "our leading admiralty authority." *Chevron Oil Co. v. Huson*, 404 U.S. 97, 115 (1971)) wrote that "it is firmly established in this Circuit" that offshore oil and gas exploration and

production is maritime commerce. 707 F.2d at 153. There is no law from other Circuits to the contrary, and no law from this Court to the contrary. (Section IV, *infra*, explains why petitioners' reliance on *Rodrigue v. Aetna Casualty and Surety Co.*, 395 U.S. 352 (1969), is misplaced.) Offshore oil and gas activity is maritime commerce because it takes place on platforms and other structures located in mid-ocean (*Pippen, supra*, 661 F.2d at 384 n. 9), because it involves the use of vessels and necessitates transportation of men and materials over water, and because the hazards confronted by the workers engaged in such activities—whether from platforms or floatable structures—are essentially the hazards of oil patch compounded by the hazards of the sea. (Court below, A-5, n. 2.)[3]

The question before this Court is the proper construction of the Longshoremen's Act term, "maritime employment." While the legislative history of the 1972 amendments to the Longshoremen's Act indicates that the term "maritime employment" is broader than the specific categories presented by way of illustration in section 2(3), there is no clear indication on the fixed platform issue. Congress did not provide an answer to the question presented, and the judiciary must supply it. (Petitioners appear to agree that it is a matter for the courts, asserting only that this Court, not the Court of Appeals, should decide it. Petitioners' Original Brief at 5, 17-18.) A conclusion against coverage in the present case would "create a curious hole"

---

[3] A Bureau of Labor Statistics study announced October 7, 1983, showed that oil and gas field workers have almost twice as many work related accidents as compared to all other industries and 40% of the workers surveyed blamed conditions at the worksite such as slippery surfaces, limited work areas, and poor weather. *Insurance Advocate*, October 22, 1983, p. 11

Longshoremen's Act coverage, providing a kind of "checkered coverage (which) would harken back to the days of 'maritime but local' exceptions...." (Court below, 703 F.2d at __ and n. 2.) Reason and common sense suggest that the hazards to the fixed platform worker inside state waters do not differ from the hazards confronted by platform workers on the outer Continental Shelf, where there is clear Longshoremen's Act coverage via the OCSLA. Further, there is no reason to suppose that the hazards confronted by fixed and floating structure workers are appreciably different, and floating rig workers are now clearly covered by the Longshoremen's Act proper on the holding in *Perini, supra.* Affirming the Fifth Circuit view that offshore oil and gas activity is maritime commerce is the only way to avoid this curious hole in coverage.

Petitioners offer no practical or policy reason for denying coverage. (Amici suggest a potential backlog of Longshoremen's Act claims will result from affirming the decison below, giving no numbers, but the Department of Labor, which administers the Longshoremen's Act, supports coverage on the present facts.) The only significant argument adduced against coverage is a misreading of this Court's *Rodrigue* decision, treated in Part IV, *infra.* Respondent submits that the Court below was entirely correct in relying on Congressional intent to expand coverage, Congressional concern about the relative inadequacy of state workers' compensation benefits, and the undesirability of creating a "curious hole" in Longshoremen's Act coverage, in support of the eminently sensible conclusion that oil and gas workers on fixed platforms in mid ocean are engaged in maritime employment and are entitled to Longshoremen's Act benefits.

IV. RODRIGUE DOES NOT SPEAK TO THE ISSUE BEFORE THE COURT.

The relevant portion of *Rodrigue v. Aetna Casualty and Surety Company*, 395 U.S. 352 (1969) held that traditional princples of admiralty tort jurisdiction did not include injuries on fixed platforms, and that therefore the Death on the High Seas Act did not apply to such injuries. According to the *Rodrigue* opinion, traditional principles of admiralty tort jurisdiction did not cover fixed platform injuries because the locality of such injuries was as much "land" as "piers, jetties, bridges, or even ramps or railways running into the sea." 395 U.S. at 360. *Rodrigue* was a "locality" case. (Language in *Rodrigue* suggesting a preference for state law because of the close connection of OCS workers with the adjacent state was directed to the cognate point that Congress in the OCSLA did not intend to make maritime law applicable to fixed platforms.)

Subsequent references by this Court to the *Rodrigue* decision have treated it as a locality case. *Victory Carriers, Inc. v. Law*, 404 U.S. 202, 205 (1971); *Nacirema Co. v. Johnson*, 396 U.S. 212, 215 n. 6 (1969). But locality is no longer the test for admiralty tort jurisdiction. *Executive Jet Aviation v. City of Cleveland*, 409 U.S. 249 (1972), explained why the locality test had not worked very well—both because it included within admiralty jurisdiction matters best left out *and* because it excluded from admiralty jurisdiction matters that should be included—and adopted a "significant relationship with traditional maritime activity" test. In *Foremost Insurance Co. v. Richardson*, __ U.S. __, 102 S.Ct. 2654 (1982), this Court explained that a central focus of *Executive Jet* had been the necessity of extending admiralty jurisdiction "to torts with a significant relationship to traditional maritime activity, but with no maritime locality." 102 S.Ct. at __, text and n. 4.

The *Foremost* discussion indicates that locality may not always be an independent requisite of admiralty tort jurisdiction. Furthermore, *Executive Jet* established that the Death on the High Seas Act can itself be a predicate for admiralty tort jurisdiction, independent of traditional principles. 409 U.S. at 274 & n. 26. See also *Smith v. Pan Air Corp.*, 684 F.2d 1102, __ (5th Cir. 1982). Thus, *Executive Jet* seems clearly to have altered the relied-upon features of *Rodrigue.*

A central point in *Rodrigue* was that Congress did not intend to treat fixed platforms like vessels, which has little to do with the maritime employment test under the Longshoremen's Act. Not only were petitioners Dore and Rodrigue clearly entitled to Longshoremen's benefits at the time of their death through the Lands Act, Dore, who was engaged in longshoring, could be covered directly after 1972 even though his work took place on a platform (pier). The reliance by petitioner here on *Rodrigue* ignores this plain language of the 1972 amendments specifically including piers, wharves and the like as the "ordinary stuff" of longshoring and maritime employment. 33 U.S.C. §903(a), U.S. Code Cong. and Admin. News 1972, p. 4708.

More to the point, however, is the clarity with which this Court has indicated that the tort jurisdiction principles at issue in *Rodrigue* and *Executive Jet* do not bear usefully on the question of coverage under the Longshoremen's Act. In *Perini, supra*, this Court stated that employer's reliance on tort jurisdiction principles was "misplaced" because the admiralty jurisdiction statute (28 U.S.C. §1333) and the Longshoremen's Act "are two different statutes 'each with different legislative histories and jurisprudential interpretations over the course of decades.'" 103 S.Ct. at 649 n. 29. *Rodrigue* held that 28 U.S.C.

§1333 (as it was then being construed by the courts) did not cover fixed-platform injuries; it did not speak in any way to the coverage of the Longshoremen's Act. Furthermore, the Rodrigue Court expressly acknowledged that Congress clearly has the power to extend admiralty jurisdiction and/or all or part of federal maritime law to fixed platforms. 395 U.S. at 364. See also *Nacirema Co. v. Johnson*, 396 U.S. 212, 215 n. 7 (1969); *Victory Carriers, Inc. v. Law*, 404 U.S. 202, 211 (1971). The question presented in the instant case is whether the 1972 amendments to the Longshoremen's Act have extended Longshoremen's Act coverage to such injuries. Except to the extent that it indicates that Congress certainly has the power to do that, *Rodrigue* is not relevant.

CONCLUSION

Respondent submits that the opinion of the Fifth Circuit is a recognition of the realities of offshore oilfield work as maritime commerce. As stated by Judge Tate:

> "...marine petroleum workers are not 'fortuitously' located on the water, but are required to work there by the nature of their jobs, a substantial maritime relationship."
>
> *Boudreaux*, 680 F.2d at 1050.

Respondent was engaged in maritime employment because his overall employment included the maintenance of oil and gas lines carrying minerals from beneath the sea, transportation across navigable waters by vessels and the undertaking of risks and hazards peculiar to the sea.

The fixed platform on which Gray worked meets the status requirement because it is an obvious place where

loading and unloading of vessels occurs as is documented by Gray's work records.

Finally, Gray is covered by the Longshoremen's Act through the application of OCSLA because his employment is "integrally related" to the transportation by pipeline of natural resources from the outer Continental Shelf. The opinion of the Fifth Circuit should be affirmed by direct application of the Longshoremen's Act or through OCSLA.

Respectfully submitted,

DAVID W. ROBERTSON
727 East 26th Street
Austin, Texas 78705

T. GERALD HENDERSON
Post Office Box 407
Alexandria, Louisiana 71301

CERTIFICATE OF SERVICE

Undersigned counsel, a member of the Bar of this Court, certifies that copies of this brief have been served on all counsel by depositing the briefs in a United States Post Office with first-class postage prepaid, addressed as follows:

Honorable Rex E. Lee
Solicitor General of the United States
Department of Justice
Washington, D.C. 20530

Joshua S. Gillelan, II, Esq.
Office of the Solicitor of Labor
U.S. Department of Labor
Suite N 2620—NDOL
Washington, D.C. 20210

Wood Brown, III, Esq.
Montgomery, Barnett, Brown and Read
1800 First Nat'l Bank of Commerce Bldg.
New Orleans, Louisiana 70112

Robert M. Contois, Jr., Esq.
Jones, Walker, Wachter, Poitevent, Carrere & Denegre
225 Baronne Street, 28th Floor
New Orleans, Louisiana 70112

John F. Simon, Esq.
P.O. Box 6118
Alexandria, Louisiana 71301

T. GERALD HENDERSON

Office - Supreme Court, U.S.
FILED
JUL 3 1984
ALEXANDER L. STEVAS,
CLERK

No. 83-728

In the Supreme Court of the United States

OCTOBER TERM, 1983

HERB'S WELDING, INC., ET AL., PETITIONERS

v.

ROBERT H. GRAY, JR., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT

REX E. LEE
Solicitor General

KENNETH S. GELLER
Deputy Solicitor General

CAROLYN F. CORWIN
Assistant to the Solicitor General

Department of Justice
Washington, D.C. 20530
(202) 633-2217

FRANCIS X. LILLY
Solicitor of Labor

KAREN I. WARD
Associate Solicitor

ALLEN H. FELDMAN
Counsel for Appellate Litigation

JOSHUA T. GILLELAN II
STEVEN J. MANDEL
Attorneys

Department of Labor
Washington, D.C. 20210

QUESTION PRESENTED

Whether a worker, injured on a fixed drilling platform in the territorial waters of the State of Louisiana in the course of providing maintenance services for platforms located in territorial waters and on the Outer Continental Shelf, is covered under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et seq.*

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, United States Fidelity & Guaranty Co. is a petitioner, and the Director, Office of Workers' Compensation Programs, United States Department of Labor, is a respondent.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	2
Statute involved	2
Statement	3
Summary of argument	7
Argument:	
An offshore petroleum worker who is injured on a fixed drilling platform in state territorial waters while providing maintenance services for the platform is covered under the Longshoremen's and Harbor Workers' Compensation Act	9
A. In amending the LHWCA in 1972 to extend federal coverage to certain land-based injuries, Congress required proof of "status" of an employee and "situs" of an injury	10
B. Respondent Gray was "engaged in maritime employment" within the meaning of Section 2(3) of the LHWCA	15
C. Respondent Gray was injured on a covered situs within the meaning of Section 3(a) of the LHWCA	29
D. Petitioners' contention that Gray is not covered under the LHWCA is inconsistent with the principles that the Act must be read liberally and should be construed to promote Congress's objective of a uniform compensation system for maritime workers	32
Conclusion	39

TABLE OF AUTHORITIES

Cases: Page

Anderson v. *McBroom Rig Bldg. Serv., Inc.*, 5 Ben. Rev. Bd. Serv. (MB) 713 17
Bertrand v. *Shell Oil Co.*, 489 F.2d 293 29
Boudreaux v. *American Workover, Inc.*, 680 F.2d 1034, aff'g 664 F.2d 463, cert. denied, 459 U.S. 1170 ..... *passim*
Calbeck v. *Travelers Insurance Co.*, 370 U.S. 114 ..... 10, 11, 33
Chevron Oil Co. v. *Huson*, 404 U.S. 97 ..... 7, 23, 24, 26
Davis v. *Dep't of Labor & Industries*, 317 U.S. 249 11
De Bardeleben Coal Corp. v. *Henderson*, 142 F.2d 481 33
Director, OWCP v. *Perini North River Associates*, No. 81-897 (Jan. 11, 1983) ..... *passim*
Executive Jet Aviation, Inc. v. *City of Cleveland*, 409 U.S. 249 23
Foremost Insurance Co. v. *Richardson*, 457 U.S. 668 16
Fusco v. *Perini North River Associates*, 622 F.2d 1111, cert. denied, 449 U.S. 1131 15
Garvey Grain Co. v. *Director, OWCP*, 639 F.2d 366 21
Graziano v. *General Dynamics Corp.*, 663 F.2d 340 20
Guidry v. *Continental Oil Co.*, 640 F.2d 523, cert. denied, 454 U.S. 818 35
Hendon v. *Marathon-LeTourneau*, 414 F. Supp. 1282 29
Henning v. *Vacco Wireline Services*, 2 Ben. Rev. Bd. Serv. (MB) (ALJ) 87 30
Hullinghorst Industries, Inc. v. *Carroll*, 650 F.2d 750, cert. denied, 454 U.S. 1163 ..... 18, 20, 32
Jenkins v. *McDermott, Inc.*, No. 83-3425 (5th Cir. June 14, 1984) 16
Ledoux v. *Petroleum Helicopters, Inc.*, 609 F.2d 824 22
Lemelle v. *B.F. Diamond Construction Co.*, 674 F.2d 296, cert. denied, 459 U.S. 1177 19
Mississippi Coast Marine, Inc. v. *Bosarge*, 637 F.2d 994 15

Cases—Continued: Page

Nacirema Operating Co. v. *Johnson*, 396 U.S. 212 ..... 11, 12
Nalco Chemical Corp. v. *Shea*, 419 F.2d 572 22
Neal v. *Wilson Wireline Services*, 2 Ben. Rev. Bd. Serv. (MB) (ALJ) 88 30
Newport News Shipbuilding & Dry Dock Co. v. *Graham*, 573 F.2d 167, cert. denied, 439 U.S. 979 21
Nogueira v. *New York, N.H. & H.R.R.*, 281 U.S. 128 14
Northeast Marine Terminal Co. v. *Caputo*, 432 U.S. 249 ..... *passim*
Novelties Distribution Corp. v. *Molee*, 710 F.2d 922, cert. denied, No. 83-538 (Jan. 23, 1984) 32
Odom Construction Co. v. *Dep't of Labor*, 622 F.2d 110, cert. denied, 450 U.S. 966 ..... 15, 20, 32
P.C. Pfeiffer Co. v. *Ford*, 444 U.S. 83 ..... 16, 33, 34, 35, 36, 37
Pennsylvania R.R. v. *O'Rourke*, 344 U.S. 334 14
People's Ferry Co. v. *Beers*, 61 U.S. (20 How.) 393 27
Pippen v. *Shell Oil Co.*, 661 F.2d 378 ..... 17, 25-26, 37
Price v. *Norfolk & W. Ry.*, 618 F.2d 1059 21
Producers Drilling Co. v. *Gray*, 361 F.2d 432 29
Prolerized New England Co. v. *Benefits Review Board*, 637 F.2d 30, cert. denied, 452 U.S. 938 ..... 21, 31
Rodrigue v. *Aetna Casualty & Surety Co.*, 395 U.S. 352 ..... 7, 23, 24, 25, 26, 29, 30
Smith v. *Chevron Oil Co.*, 517 F.2d 1154 35
Sohyde Drilling & Marine Co. v. *Coastal States Gas Producing Co.*, 644 F.2d 1132, cert. denied, 454 U.S. 1081 ..... 25, 26
Southern Pacific Co. v. *Jensen*, 244 U.S. 205 11
Sun Ship, Inc. v. *Pennsylvania*, 447 U.S. 715 ..... 4, 11, 33
Texports Stevedore Co. v. *Winchester*, 632 F.2d 504, cert. denied, 452 U.S. 905 ..... 31, 32
Thornton v. *Brown & Root, Inc.*, 707 F.2d 149, cert. denied, No. 83-343 (Jan. 9, 1984) 15, 16
Toups v. *Chevron Oil Co.*, 7 Ben. Rev. Bd. Serv. (MB) 261 17
Trotti & Thompson v. *Crawford*, 631 F.2d 1214 20
Victory Carriers, Inc. v. *Law*, 404 U.S. 202 28

Cases—Continued: Page

Voison v. *O.D.E.C.O. Drilling, Inc.*, 557 F. Supp. 715 17
Voris v. *Eikel*, 346 U.S. 328 33
Ward v. *Director, OWCP*, 684 F.2d 1114, cert. denied, 459 U.S. 1170 22
Weyerhaeuser Co. v. *Gilmore*, 528 F.2d 957, cert. denied, 429 U.S. 868 15-16
Wiley v. *Wilson Wireline Services*, 2 Ben. Rev. Bd. Serv. (MB) (ALJ) 86 30

Statutes:

Admiralty Extension Act, 46 U.S.C. 740 ..... 25, 26
Jones Act, 46 U.S.C. 688 ..... 27, 28, 35
Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et seq.* 4, 9
§ 2(3), 33 U.S.C. (1970 ed.) 902(3) (44 Stat. 1425) 13
§ 2(3), 33 U.S.C. 902(3) ..... *passim*
§ 2(4), 33 U.S.C. (1970 ed.) 902(4) (44 Stat. 1425) 14
§ 2(4), 33 U.S.C. 902(4) 15, 32
§ 3(a), 33 U.S.C. (1970 ed.) 903(a) (44 Stat. 1426) 13, 29
§ 3(a), 33 U.S.C. 903(a) 2, 7, 10, 12, 13, 29
§ 21(b), 33 U.S.C. 921(b) 5
§ 21(c), 33 U.S.C. 921(c) 5
Outer Continental Shelf Lands Act, 43 U.S.C. (& Supp. V) 1301 *et seq.*:
43 U.S.C. 1301(a) 3
43 U.S.C. 1331(a) 3
43 U.S.C. (1970 ed.) 1333(a)(2) 23-24, 25
43 U.S.C. (Supp. V) 1333(b) 4, 23, 28, 35, 38
43 U.S.C. (Supp. V) 1333(b)(1) 35

Miscellaneous:

Alston, *Admiralty Jurisdiction and Fixed Offshore Drilling Platforms: A Radical Plea Reconsidered*, 28 Loy. L. Rev. 379 (1982) 19
Bureau of Labor Statistics, Dep't of Labor, *Bull. No. 2179, Injuries in Oil and Gas Drilling and Services* (Aug. 1983) 20

Miscellaneous—Continued: Page

117 Cong. Rec. 10490-10491 (1971) 27
G. Gilmore & C. Black, *The Law of Admiralty* (2d ed. 1975) 14
H.R. Rep. 92-1441, 92d Cong., 2d Sess. (1972) 12, 13, 16
Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972: Hearings on S.2318, S.525 and S.1547 Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, 92d Cong., 2d Sess. (1972) 18, 19, 27, 28, 30, 32, 36
Robertson, *Injuries to Marine Petroleum Workers: A Plea for Radical Simplification*, 55 Tex. L. Rev. 973 (1977) 18, 19, 23, 25, 29
S. 1547, 92d Cong., 1st Sess. (1971) 27
S. Rep. 92-1125, 92d Cong., 2d Sess. (1972) 12, 13, 16, 22, 37

In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-728

HERB'S WELDING, INC., ET AL., PETITIONERS

v.

ROBERT H. GRAY, JR., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A9) is reported at 703 F.2d 176. The opinion of the court of appeals denying rehearing (Pet. App. A10-A13) is reported at 711 F.2d 666. The initial decision and order of the Benefits Review Board (Pet. App. A19-A37) is reported at 12 Ben. Rev. Bd. Serv. (MB) 752. The decision and order of the Benefits Review Board following remand (Pet. App. A46-A49) is not reported. The decisions and orders of the administrative law judge (Pet. App. A14-A18, A39-A45) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on April 18, 1983, and a petition for rehearing was denied on August 8, 1983 (Pet. App. A10-A13). The petition for a writ of certiorari was filed on October 14, 1983, and was granted on March 19, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

Section 2(3) of the Longshoremen's and Harbor Workers' Compensation Act (LHWCA or the Act), 33 U.S.C. 902(3), provides:

> The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker, but such term does not include a master or member of a crew of any vessel, or any person engaged by the master to load or unload or repair any small vessel under eighteen tons net.

Section 3(a) of the LHWCA, 33 U.S.C. 903(a), provides in pertinent part:

> Compensation shall be payable under this [Act] in respect of disability or death of an employee but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel). * * *

STATEMENT

1. Respondent Robert H. Gray, Jr. was employed by petitioner Herb's Welding, Inc., a company that provided welding services to marine oil field rigs.[1] Gray was assigned to the Bay Marchand marine oil and gas field, which is located both in Louisiana territorial waters and on the Outer Continental Shelf (*i.e.*, on both sides of the line that marks the three-mile boundary).[2] His duties included repairing and maintaining oil and gas lines and the fixed platform production structures from which the lines ran. While on duty Gray lived, ate and slept on a platform situated in Louisiana waters and worked on platforms located throughout the field, in both Louisiana waters and Outer Continental Shelf waters.[3] He was transported to his daily work sites by boat or helicopter. Pet. App. A2. Approximately 25% of Gray's working time was spent on platforms located on the Outer Continental Shelf (*id.* at A26).

On July 11, 1975, the day of his injury, Gray was assigned to a platform located in the navigable waters of Louisiana (Pet. App. A2). The platform, which was owned by Chevron Oil Company, was fed by a gas flow line that extended out to the Outer Continental Shelf (*id.* at A11, A26). While Gray

---

[1] Petitioners' opening brief (at ii) indicates that Herb's Welding, Inc. is no longer in existence.

[2] In general, lands under navigable waters that are within three miles of the coast line are under state jurisdiction. Submerged lands beyond this boundary are part of the Outer Continental Shelf and are subject to federal jurisdiction. 43 U.S.C. 1301(a), 1331(a).

[3] Gray normally was on duty seven days in a row, alternating with seven days off duty. See Jan. 20, 1978 Tr. 31.

was welding a gas line on the platform, an explosion occurred; in trying to run from the area, he sustained a knee injury. Petitioner United States Fidelity & Guaranty Company, the workers' compensation carrier for Herb's Welding, paid benefits to Gray under the Louisiana workers' compensation statute. However, the carrier refused to pay benefits under the Longshoremen's and Harbor Workers' Compensation Act (LHWCA or the Act), 33 U.S.C. 901 *et seq.* Pet. App. A2.[4]

2. Gray filed a claim for LHWCA benefits with the Department of Labor, contending that he was entitled to such benefits by virtue of the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. (Supp. V) 1333(b). Pet. App. A15. The OCSLA provides that an individual who is injured as a result of offshore petroleum operations on the Outer Continental Shelf is entitled to receive LHWCA benefits.[5] Following a hearing, an administrative law judge determined that Gray was not entitled to LHWCA benefits because he was not "engaged in maritime em-

[4] Benefits available under the LHWCA were greater than the benefits Gray received under the Louisiana workers' compensation statute. See Pet. App. A3, A42; *Sun Ship, Inc.* v. *Pennsylvania*, 447 U.S. 715, 724 (1980).

[5] 43 U.S.C. (Supp. V) 1333(b) provides in pertinent part:

> With respect to disability or death of an employee resulting from any injury occurring as the result of operations conducted on the outer Continental Shelf for the purpose of exploring for, developing, removing or transporting by pipeline the natural resources, or involving rights to the natural resources, of the subsoil and seabed of the outer Continental Shelf, compensation shall be payable under the provisions of the Longshoremen's and Harbor Workers' Compensation Act.

ployment" within the meaning of Section 2(3) of the Act, 33 U.S.C. 902(3). Pet. App. A14-A18.

Gray appealed to the Benefits Review Board pursuant to 33 U.S.C. 921(b). In a divided decision (Pet. App. A19-A37), the Board ruled that Gray was covered by virtue of the OCSLA and thus was entitled to LHWCA benefits (Pet. App. A26). The Board concluded that the administrative law judge had erred in requiring Gray to show that he was "engaged in maritime employment" when he claimed LHWCA benefits by virtue of the OCSLA (Pet. App. A22). The Board reasoned that Gray's employment as a welder on platforms in both territorial waters and on the Outer Continental Shelf was "integrally related to the operations enumerated in Section 1333 of the OCSLA" and that "his injury was incurred as a result of such activity" (Pet. App. A26). The Board did not reach the question whether Gray was covered under the terms of the LHWCA itself. The Board's dissenting member believed that the OCSLA was not applicable because the platform on which Gray was injured was located in territorial waters (Pet. App. A27-A37).[6]

3. Petitioners sought judicial review of the Board's decision pursuant to 33 U.S.C. 921(c). The court

[6] The Benefits Review Board remanded the case for further proceedings in accordance with its decision. However, petitioners proceeded to file a petition for review with the United States Court of Appeals for the Fifth Circuit. The court of appeals granted the motion of the Director, OWCP, to dismiss the petition for review, without prejudice to refiling after entry of the final order of the Benefits Review Board (Pet. App. A38). The administrative law judge then issued a decision and order establishing the amount of benefits to which Gray was entitled (*id.* at A39-A45), and the Benefits Review Board affirmed (*id.* at A46-A49).

of appeals affirmed without addressing the Board's analysis of coverage under the OCSLA. The court determined instead that Gray was covered under the terms of the LHWCA itself. Pet. App. A1-A9.

The court of appeals decided initially that "the LHWCA can reach an offshore oil field worker injured upon a fixed platform located in Louisiana waters" (Pet. App. A3). It concluded that fixed offshore platforms "are essential to and customarily used in the loading and unloading of crews, supplies and oil" and that they serve a function identical to that of wharves over navigable waters (*id.* at A4). The court noted that workers injured on movable drilling barges in both territorial waters and on the Outer Continental Shelf are covered under the LHWCA, as are workers injured on fixed platforms on the Outer Continental Shelf (Pet. App. A4). The court declined to create a "curious hole in LHWCA coverage" by denying benefits to workers, like Gray, who are injured on fixed platforms in territorial waters (Pet. App. A5).

The court of appeals then concluded that the situs and status tests for LHWCA coverage were met in this case (Pet. App. A6-A9). The court held that the situs of the injury was within the "expanded shoreside coverage of the Act" (*id.* at A7), because the platform on which Gray was injured functioned as a wharf and, "[b]y its location, extending from an island it adjoins navigable waters" (*ibid.*). The court held that the status test was satisfied because Gray's duties were "a central part" of the offshore drilling process, which constitutes "maritime commerce" (*id.* at A8-A9).

SUMMARY OF ARGUMENT

A. The court of appeals correctly concluded that respondent Gray, a marine welder injured on a fixed drilling platform in Louisiana territorial waters, was covered by the LHWCA. In 1972 Congress extended LHWCA coverage by redefining the term "navigable waters" to include, inter alia, piers, wharves, and "other adjoining area[s] customarily used by an employer in loading, unloading, repairing, or building a vessel." 33 U.S.C. 903(a). At the same time Congress provided that in order to be covered under the LHWCA an employee must be "engaged in maritime employment." 33 U.S.C. 902(3). Thus eligibility for LHWCA coverage now depends on proof of both "status" of the employee and "situs" of the injury.

B. Gray meets the status test for LHWCA coverage because his duties were "maritime" in nature. The work in which Gray was engaged—maintenance of offshore oil and gas lines and fixed platforms—is essential to the offshore drilling process, which has become a major maritime activity. Even if Gray's work on offshore oil operations were insufficient by itself to support the conclusion that he was engaged in maritime employment, the combination of his work on offshore oil operations and the fact that he was required to spend time on navigable waters in the regular course of his employment would satisfy the status requirement.

The conclusion that Gray was engaged in maritime employment is not inconsistent with this Court's holdings in *Rodrigue* v. *Aetna Casualty & Surety Co.*, 395 U.S. 352 (1969), and *Chevron Oil Co.* v. *Huson*, 404 U.S. 97 (1971), which concern admiralty tort jurisdiction and the intent of Congress in enacting the OCSLA, not the LHWCA. Nor did Congress

reject LHWCA coverage of all offshore oil workers when it failed to enact proposed legislation on that subject in 1972. Congress's action most likely reflects its desire not to deprive crew members engaged in offshore oil operations of their more lucrative Jones Act recoveries and a belief that existing legislation and the 1972 amendments would afford LHWCA coverage to all noncrew offshore oil workers.

C. Gray also meets the situs requirement for LHWCA coverage. Offshore drilling platforms are surrounded by water; in addition, they bear considerable resemblance to piers and wharves in their structure and appearance and are customarily used in the loading and unloading of crews, supplies and oil. Even if only a part of the platform on which Gray was injured was used for loading and unloading, the entire platform qualifies as a covered situs.

D. Petitioners' contention that Gray is not covered by the LHWCA is inconsistent with the principles that the Act must be construed liberally in favor of coverage and that the 1972 amendments should be read in a manner consistent with Congress's goal of creating a uniform compensation system for maritime workers. Congress was particularly concerned about avoiding situations in which workers would walk in and out of LHWCA coverage in the course of their employment. Since offshore oil workers are clearly covered by the LHWCA in connection with injuries on either fixed platforms or movable rigs on the Outer Continental Shelf and in connection with injuries on movable rigs in territorial waters, it would be anomalous to conclude that Congress meant to exclude coverage of the remaining category of injuries—those that take place on fixed platforms

in territorial waters. Offshore oil workers in any of these locations face similar maritime hazards in connection with their employment.

Exclusion of LHWCA coverage for injuries incurred on fixed platforms in territorial waters would be particularly anomalous in the case of a worker like Gray. Because he regularly travelled on water in the course of his employment and worked on platforms on the Outer Continental Shelf for 25% of his time, Gray was covered by the LHWCA in connection with injuries sustained during a substantial part of his employment. It is most unlikely that Congress intended to withhold uniform LHWCA coverage in such circumstances.

ARGUMENT

AN OFFSHORE PETROLEUM WORKER WHO IS INJURED ON A FIXED DRILLING PLATFORM IN STATE TERRITORIAL WATERS WHILE PROVIDING MAINTENANCE SERVICES FOR THE PLATFORM IS COVERED UNDER THE LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT

The court of appeals correctly concluded that respondent Gray, a marine welder who was injured on a fixed drilling platform in Louisiana territorial waters, was covered by the Longshoremen's and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. 901 *et seq.* In amending the LHWCA in 1972, Congress sought to create a system of uniform coverage for injuries to maritime workers, thereby avoiding situations in which such workers would walk in and out of coverage during the course of their employment. Petitioners' contention that Gray's injury was not covered under the LHWCA rests on the unlikely

supposition that Congress, contrary to its general concern for uniform coverage, would have wanted to retain a situation in which offshore petroleum workers would move in and out of LHWCA coverage during the course of their working day, as they switched back and forth between fixed platforms and movable platforms or other vessels, and between jobs in territorial waters and jobs on the Outer Continental Shelf. Like the court of appeals, we see no indication that Congress intended such a "curious hole in LHWCA coverage" (Pet. App. A5). We show below that Gray was "engaged in maritime employment" within the meaning of Section 2(3) of the LHWCA and was working at a covered situs under Section 3(a) of the Act at the time he was injured. Accordingly, he qualifies for coverage under the LHWCA.

A. In Amending the LHWCA in 1972 to Extend Federal Coverage to Certain Land-Based Injuries, Congress Required Proof of "Status" of an Employee and "Situs" of an Injury

In order to understand the criteria for LHWCA coverage against which Gray's claim must be measured, some background is useful. Congress enacted the LHWCA in 1927 to provide a federal workers' compensation remedy for certain maritime injuries. See *Calbeck* v. *Travelers Insurance Co.*, 370 U.S. 114, 117-124 (1962). In 1972, Congress made its "first significant effort to reform the 1927 Act and the judicial gloss that had been attached to it." *Northeast Marine Terminal Co.* v. *Caputo*, 432 U.S. 249, 261 (1977). The 1972 amendments increased the level of benefits paid under the Act and overruled several cases in which this Court had defined the respective rights of longshoremen, shipowners, and employers.

Id. at 261-262. The amendments also expanded the coverage of the Act. In particular, Congress sought to end anomalies that had existed under the Act, with the goal of producing a uniform compensation scheme for maritime workers.

The original LHWCA provided for coverage of all work-related injuries that occurred on navigable waters. See *Calbeck* v. *Travelers Insurance Co.*, 370 U.S. at 124; *Davis* v. *Dep't of Labor & Industries*, 317 U.S. 249 (1942). Coverage under the original Act stopped at the water's edge—the boundary known as the *Jensen* line.[7] *Nacirema Operating Co.* v. *Johnson*, 396 U.S. 212, 219 (1969). In *Nacirema Operating Co.*, the Court held (*id.* at 219-220) that longshoremen whose injuries occurred on a pier attached to land were not covered by the LHWCA and could receive benefits only under state workers' compensation statutes. The Court noted, however, that Congress had the constitutional power to provide for compensation for injuries to maritime workers occurring on land (*id.* at 223-224) and that "there was much to be said for the uniform treatment of longshoremen irrespective of whether they were performing their duties upon the navigable waters (in which case they would be covered under *Calbeck*), or whether they were performing those same duties on

---

[7] In *Southern Pacific Co.* v. *Jensen*, 244 U.S. 205 (1917), this Court held that a state could not apply its workers' compensation statute to an injury sustained on a gangplank between a vessel lying in navigable waters of the United States and a wharf because the federal government has the sole power, under the admiralty clause of the Constitution, to regulate such maritime injuries. Congress eventually enacted the LHWCA in response to the *Jensen* decision. See, *e.g.*, *Sun Ship, Inc.* v. *Pennsylvania*, 447 U.S. 715, 717-718 (1980).

a pier." *Director, OWCP* v. *Perini North River Associates*, No. 81-897 (Jan. 11, 1983), slip op. 19 (describing the Court's statement in *Nacirema Operating Co.*).

In enacting the 1972 LHWCA amendments Congress responded to the Court's comments in *Nacirema Operating Co.* by extending LHWCA coverage shoreward. Congress recognized that the substantial increases in LHWCA benefit levels it was enacting in 1972 heightened the apparent irrationality of the *Jensen* line that had demarcated the boundaries of federal coverage. *Northeast Marine Terminal Co.* v. *Caputo*, 432 U.S. at 261-263. Congress considered the workers' compensation benefits offered by many states to be inadequate. S. Rep. 92-1125, 92d Cong., 2d Sess. 12 (1972). In its report on the 1972 amendments, the Senate committee stated: "It is apparent that if the Federal benefit structure embodied in [the] Committee bill is enacted, there would be a substantial disparity in benefits payable to a permanently disabled longshoreman, depending on which side of the water's edge the accident occurred * * *." *Id.* at 13. As the LHWCA then stood, the amount of benefits an injured longshoreman or other maritime worker received depended on "the fortuitous circumstance of whether the injury occurred on land or over water." *Ibid.* The Senate committee also observed that, with the advent of modern cargo-handling techniques, much of the longshoreman's work had shifted onto land. *Ibid.* See also H.R. Rep. 92-1441, 92d Cong., 2d Sess. 10 (1972).

Congress extended LHWCA coverage ashore by bringing certain areas landward of the *Jensen* line within the definition of "navigable waters." Amended Section 3(a) of the Act, 33 U.S.C. 903(a), directs

that compensation be paid for death or disability resulting from an injury "occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel)."[8] Congress perceived this shoreward extension of coverage as solving a long-standing problem for longshoremen, ship repairmen, and other "amphibious" workers who, under the original Act, had moved in and out of LHWCA coverage during the course of their working day. In Congress's view, the amended LHWCA would provide a "uniform compensation system to apply to employees who would otherwise be covered by this Act for part of their activity." S. Rep. 92-1125, *supra*, at 13; H.R. Rep. 92-1441, *supra*, at 10-11. See *Northeast Marine Terminal Co.* v. *Caputo*, 432 U.S. at 273.

The original LHWCA had included only a test based on "situs," *i.e.*, whether an injury occurred on navigable waters.[9] When it expanded the situs test to cover certain shoreside areas in 1972, Congress faced the problem that many employees working in the newly covered areas (*e.g.*, truck drivers picking up or delivering cargo) had only a transitory connection with the waterfront. Because of the diversity

---

[8] Prior to 1972, the parenthetical provided only that dry docks were included within the term "navigable waters of the United States." See former Section 3(a) of the Act, 44 Stat. 1426 (previously codified at 33 U.S.C. (1970 ed.) 903(a)).

[9] The original Act also defined the term "employee," but only in negative terms. The definition excluded seamen and persons engaged by a master to load, unload, or repair small vessels. See former Section 2(3), 44 Stat. 1425 (previously codified at 33 U.S.C. (1970 ed.) 902(3)).

of employees who worked in these areas, " 'it became necessary to describe affirmatively the class of workers Congress desired to compensate.' " *Perini North River Associates*, slip op. 20 (quoting *Northeast Marine Terminal Co.* v. *Caputo*, 432 U.S. at 264). Congress therefore amended the definition of "employee" under Section 2(3) of the Act to refer to "any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker * * *." 33 U.S.C. 902(3).[10] The 1972 amendments thus moved from a test of eligibility for compensation based only on situs to a test requiring proof of both the status of the employee and the situs of the injury. *Northeast Marine Terminal Co.* v. *Caputo*, 432 U.S. at 264-265. As we now show, Gray satisfies both parts of this test.

---

[10] The original LHWCA used the term "maritime employment," but only as part of the definition of "employer." The latter term was defined as "an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any dry dock)." Section 2(4), 44 Stat. 1425. The courts rarely discussed the "maritime employment" requirement of the original Act, because the requisite "maritime employment" nexus was generally assumed to exist in the case of any employee injured while working on the water. See *Perini North River Associates*, slip op. 12; G. Gilmore & C. Black, *The Law of Admiralty* 428 (2d ed. 1975); see also *Pennsylvania R. R.* v. *O'Rourke*, 344 U.S. 334, 339-342 (1953); *Nogueira* v. *New York, N.H. & H.R.R.*, 281 U.S. 128, 131-134 (1930).

B. Respondent Gray Was "Engaged in Maritime Employment" Within the Meaning of Section 2(3) of the LHWCA

The court of appeals correctly concluded that respondent Gray was "engaged in maritime employment" within the meaning of Section 2(3) of the LHWCA, 33 U.S.C. 902(3), and that he therefore meets the status test for LHWCA coverage.[11]

1. Gray meets the status test by virtue of the fact that his duties were integral to the offshore drilling process and were therefore "maritime" in nature. The courts of appeals, including the court below, have determined the status of land-based workers on the basis of whether their activities have a "realistically significant relationship to traditional maritime activity" (Pet. App. A8). See, *e.g.*, *Thornton* v. *Brown & Root, Inc.*, 707 F.2d 149, 152 (5th Cir. 1983), cert. denied, No. 83-243 (Jan. 9, 1984); *Mississippi Coast Marine, Inc.* v. *Bosarge*, 637 F.2d 994, 997-998 (5th Cir. 1981); *Odom Construction Co.* v. *Dep't of Labor*, 622 F.2d 110, 113 (5th Cir. 1980), cert. denied, 450 U.S. 966 (1981); cf. *Fusco* v. *Perini North River Associates*, 622 F.2d 1111, 1113 (2d Cir. 1980), cert. denied, 449 U.S. 1131 (1981); *Weyerhaeuser Co.* v. *Gilmore*, 528 F.2d 957, 961 (9th Cir. 1975), cert.

---

[11] The parties stipulated that Gray was injured in the course of his employment (Pet. App. A15). Petitioners do not appear to contend that Herb's Welding was not an "employer" within the meaning of Section 2(4) of the LHWCA, 33 U.S.C. 902(4). Section 2(4) now defines that term as "an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel)."

denied, 429 U.S. 868 (1976); see also *Boudreaux* v. *American Workover, Inc.*, 680 F.2d 1034, 1047, 1049 (5th Cir. 1982) (en banc), cert. denied, 459 U.S. 1170 (1983). And cf. *Foremost Insurance Co.* v. *Richardson*, 457 U.S. 668, 674 (1982). Petitioners do not challenge the applicability of this test.[12]

The court of appeals correctly applied the "realistically significant relationship" test in this case. As the court remarked, "[o]ffshore drilling—the discovery, recovery and sale of oil and natural gas from the sea bottom—is maritime commerce" (Pet. App. A9). Therefore, workers engaged in the offshore drilling process are "engaged in maritime employment." See *Jenkins* v. *McDermott, Inc.*, No. 83-3425 (5th Cir. June 14, 1984), slip op. 4148-4149; *Thornton* v. *Brown & Root, Inc.*, 707 F.2d at 153; *Boudreaux* v. *American Workover, Inc.*, 680 F.2d at

[12] In *Perini North River Associates*, slip op. 19-21, this Court rejected application of the "significant relationship" test to employees injured on navigable waters because, in establishing the separate situs and status tests in the 1972 LHWCA amendments, Congress did not intend to withdraw coverage from employees "traditionally covered by the Act, who were injured in the course of their employment on navigable waters as previously defined" (*id.* at 21 n.27). The Court did not reach the question whether the test properly applied to workers injured on land (*ibid.*). See Pet. App. A8.

The term "maritime employment" is not limited to occupations specifically enumerated in Section 2(3) of the Act. See, *e.g.*, S. Rep. 92-1125, *supra*, at 13, 16; H.R. Rep. 92-1441, *supra*, at 10-11, 14. See also *Perini North River Associates*, slip op. 21 n.27; *P.C. Pfeiffer Co.* v. *Ford*, 444 U.S. at 77-78 n.7; *Northeast Marine Terminal Co.* v. *Caputo*, 432 U.S. at 265 n.25. The "significant relationship" test provides a reasonable criterion for determining which land-based workers, other than those specifically enumerated in the statute, can be said to be engaged in maritime employment.

1052-1053, aff'g 664 F.2d 463 (5th Cir. 1981); *Pippen* v. *Shell Oil Co.*, 661 F.2d 378, 383-384 (5th Cir. 1981); *Voison* v. *O.D.E.C.O. Drilling, Inc.*, 557 F. Supp. 715, 718 (E.D. Tex. 1982).[13] Offshore oil exploration and production involve extensive facilities and operations on navigable waters. The panel in *Boudreaux* explained the close relationship between offshore oil operations and maritime commerce (664 F.2d at 466; footnotes omitted):

> The production of oil and natural gas from the beds of navigable bodies of water and the ocean bottom has become a maritime activity. This is a major industry with peculiar maritime-related problems. Employment in an industry that provides approximately 40,000 jobs, and untold millions of dollars in revenues and that takes place primarily upon the navigable waters of the United States, bears "a significant relationship to . . . commerce on navigable waters."

Petitioners and amici contend that there is nothing in offshore oil operations that can be regarded as inherently "maritime," apparently because oil exploration and production activities take place on land as well. See Pet. Br. 11; Kerr-McGee Am. Br. 6; Texaco, et al. Am. Br. 12-16. But, of course, many activities that are clearly "maritime" in nature (*e.g.*,

[13] The Benefits Review Board held in two decisions that offshore oil workers on fixed platforms were not engaged in maritime employment for purposes of LHWCA coverage. See *Toups* v. *Chevron Oil Co.*, 7 Ben. Rev. Bd. Serv. (MB) 261 (1977); *Anderson* v. *McBroom Rig Bldg. Serv., Inc.*, 5 Ben. Rev. Bd. Serv. (MB) 713 (1977). However, in those cases the Board relied primarily on several older Fifth Circuit decisions that involved alleged maritime torts. As we show below (at 23-25), such decisions do not control the question of LHWCA coverage.

unloading cargo and transporting passengers) have close counterparts in land-based enterprises. Thus, the fact that the petroleum industry operates on land as well as offshore does not deprive the latter operations of their maritime character. See, *e.g.*, *Boudreaux*, 680 F.2d at 1049 n.30; *Hullinghorst Industries, Inc.* v. *Carroll*, 650 F.2d 750, 756 (5th Cir. 1981), cert. denied, 454 U.S. 1163 (1982).

Moreover, there are significant differences between petroleum industry operations on land and offshore. Special equipment and techniques suited to a marine environment are necessary in connection with offshore operations. Many offshore operations are conducted from vessels, particularly during the exploration stage. *Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972: Hearings on S.2318, S.525 and S.1547 Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare*, 92d Cong., 2d Sess. 833 (1972) (hereinafter cited as *Hearings*). Even after fixed platforms are in place and production begins, much activity takes place on the water, including transportation of personnel, supplies, and equipment to and from the platforms.[14] The oil and gas themselves may be transported through underwater pipes.

---

[14] Two general classes of structures are used in exploring for and producing oil and gas found beneath the ocean. See Robertson, *Injuries to Marine Petroleum Workers: A Plea for Radical Simplification*, 55 Tex. L. Rev. 973, 982 (1977); *Hearings*, *supra*, at 480-486 (diagrams of structures); *id.* at 592-594 (descriptions of structures). One class of structures floats, or is capable of being floated, from site to site. Such structures include submersible and semi-submersible barges, jack-up rigs, and drill ships. The second class of structures, which includes artificial islands and fixed platforms, is attached to the ocean bottom. Robertson, *supra*, 55 Tex. L. Rev. at 982. Most exploratory drilling is done from floating structures, rather than from fixed platforms. *Ibid.* Once oil is discovered, fixed platforms are used to handle drilling of development wells and production. *Hearings*, *supra*, at 833.

Although not all offshore petroleum operations take place directly on the water, it seems appropriate to characterize all such operations as maritime in nature. While fixed offshore platforms are not regarded as vessels (see page 29 note 23, *infra*), they are nevertheless surrounded by water and clearly exist in a marine environment. The work performed on fixed offshore platforms is likely to be similar in many respects to that performed on movable structures. And, of particular significance, offshore operations, whether on movable or fixed structures, are accompanied by many of the same hazards associated with other maritime activity, including inclement weather, wet surfaces, danger of drowning, and so on. See *Hearings*, *supra*, at 550-551 (statement of E. Leland Richardson, representing the International Association of Drilling Contractors); *id.* at 594 (remarks of John R. Martzell, representing the Louisiana Trial Lawyers Association); *id.* at 831; Robertson, *Injuries to Marine Petroleum Workers: A Plea for Radical Simplification*, 55 Tex. L. Rev. 973, 994-996 (1977); Alston, *Admiralty Jurisdiction and Fixed Offshore Drilling Platforms: A Radical Plea Reconsidered*, 28 Loy. L. Rev. 379, 402-403 (1982). See also *Lemelle* v. *B.F. Diamond Construction Co.*, 674 F.2d 296, 298 (4th Cir. 1982), cert. denied, 459 U.S. 1177 (1983) (noting in support of a finding of LHWCA coverage that bridge demolition and construction pose many of the same hazards and working conditions as more traditional work on navigable wa-

ters).[15] Although offshore petroleum operations may not qualify strictly as "traditional" maritime activity, because they did not become technologically feasible until relatively recently, there is no reason not to identify all such operations as "maritime" in view of their close connection to the sea.

Gray's work as a welder in the Bay Marchand field was an integral part of the offshore oil operations. Construction and maintenance of maritime equipment located on landside facilities such as piers and wharves have consistently been found to constitute maritime employment. See *Hullinghorst Industries, Inc.* v. *Carroll*, *supra* (pier repair); *Trotti & Thompson* v. *Crawford*, 631 F.2d 1214 (5th Cir. 1980) (pier construction); *Odom Construction Co.* v. *Dep't of Labor*, *supra* (maintenance of mooring blocks); *Graziano* v. *General Dynamics Corp.*, 663 F.2d 340 (1st Cir. 1981) (maintenance of shipyard buildings and machinery); *Prolerized New England Co.* v. *Benefits Review Board*, 637 F.2d 30 (1st Cir. 1980), cert. denied, 452 U.S. 938 (1981) (maintenance of scrap metal cargo processing machinery); *Price* v. *Norfolk & W. Ry.*, 618 F.2d 1059 (4th Cir. 1980) (maintenance of shoreside shiploading machinery); *Newport News Shipbuilding & Dry Dock Co.* v. *Graham*, 573 F.2d 167 (4th Cir.), cert. denied, 439 U.S. 979 (1978) (maintenance of shipbuilding machinery); *Garvey Grain Co.* v. *Director, OWCP*, 639 F.2d 366 (7th Cir. 1981) (maintenance of grain cargo processing and loading machinery). Likewise, Gray's work —the maintenance of marine oil and gas lines and fixed platforms that are essential to the maritime activity of offshore oil production—was maritime in nature.

2. Even if employment in offshore petroleum operations alone were not sufficient to confer status on a worker for purposes of LHWCA coverage, offshore oil workers like Gray, who are required to spend a portion of their time on navigable waters in the course of their employment, satisfy the status test. Gray testified that he was transported between platforms, sometimes by helicopter, but "[u]sually by boat" (Jan. 20, 1978 Tr. 32). It appears that on some days Gray traveled not only to and from the platform on which he slept and ate, but also between different platforms in the course of performing a series of tasks. See *id.* at 43-45. Even when he was on the platforms, Gray was working in close proximity to the water. See page 30 note 25, *infra*.

As the court of appeals recognized (Pet. App. A4-A5), workers traveling over or through water en route to offshore drilling platform worksites are performing maritime activities within the coverage of

---

[15] As respondent Gray notes (Br. 11 n.3), the Bureau of Labor Statistics has conducted a study of injuries incurred by workers in connection with oil and gas well-drilling and servicing activities. Bureau of Labor Statistics, Dep't of Labor, *Bull. No. 2179, Injuries in Oil and Gas Drilling and Services* (Aug. 1983). The Bureau's survey, which covered injured workers in 12 states and offshore rigs in the Gulf of Mexico (*id.* at 19), does not separate statistics for offshore workers from those for other workers. The Bureau's study shows (*id.* at 1) that the injury rate for oil and gas field services (19.4 per 100 workers) is more than twice the rate for all industries (8.1 per 100 workers), and that approximately 40% of the workers surveyed complained about worksite conditions, most often slippery surfaces, limited work areas, and poor weather conditions (*id.* at 3, 17). While these conditions are not unique to offshore workers, they presumably are likely to occur more frequently on offshore rigs than in land-based operations.

the LHWCA. Workers could receive LHWCA benefits for injuries incurred in the course of such travel even before the 1972 amendments. See *Nalco Chemical Corp.* v. *Shea*, 419 F.2d 572, 574 (5th Cir. 1969) (under the pre-1972 Act, an employee injured while traveling to offshore platforms worked for an "employer" within the scope of Section 2(4) of the Act, because travel over water constituted "maritime employment").[16] In *Perini North River Associates* this Court made clear that all employment that takes place on the water was "traditionally covered" by the LHWCA before its amendment in 1972 (slip op. 22, quoting S. Rep. 92-1125, *supra*, at 16) and continues to be within the scope of amended Section 2(3), since Congress did not intend to withdraw that traditional coverage.

It is apparent that Gray was not on the water "transiently [or] fortuitously" (*Perini North River Associates*, slip op. 27 n.34); rather, he was required to be on water as a regular part of his employment. Thus, at least during the time he spent on the water, he was "engaged in maritime employment" within the meaning of Section 2(3) of the LHWCA. *Perini North River Associates*, slip op. 27. That fact, combined with the maritime nature of offshore petroleum operations in general, is plainly enough to confer on

---

[16] See also *Ward* v. *Director, OWCP*, 684 F.2d 1114, 1116-1117 (5th Cir. 1982), cert. denied, 459 U.S. 1170 (1983) (employment of fish-spotter airplane pilot, assisting fleet of fishing boats, possessed significant relationship to maritime activities). Cf. *Ledoux* v. *Petroleum Helicopters, Inc.*, 609 F.2d 824 (5th Cir. 1980) (crash of helicopter being used to ferry personnel and supplies to and from offshore drilling structures bears the type of significant relationship to traditional maritime activity necessary to involve admiralty jurisdiction).

Gray the requisite status for LHWCA coverage in connection with all aspects of his offshore work, including that performed on fixed platforms. Cf. *Northeast Marine Terminal Co.* v. *Caputo*, 432 U.S. at 273 (Congress wanted to provide full coverage for persons "whose employment is such that they spend at least part of their time in indisputably longshoring operations and who, without the 1972 Amendments, would be covered for only part of their activity").

3. Petitioners contend (Br. 7-10) that the court of appeals' conclusion that offshore drilling is maritime commerce conflicts with this Court's holdings in *Rodrigue* v. *Aetna Casualty & Surety Co.*, 395 U.S. 352 (1969), and *Chevron Oil Co.* v. *Huson*, 404 U.S. 97 (1971). But these decisions do not concern coverage under the LHWCA; rather, they involve admiralty tort jurisdiction, with its strict requirement of injury on the water, and the intent of Congress in enacting certain provisions of the Outer Continental Shelf Lands Act.[17] See Robertson, *supra*, 55 Tex. L. Rev. at 1010; cf. *Perini North River Associates*, slip op. 22-23 n.29 (noting that *Executive Jet Aviation, Inc.* v. *City of Cleveland*, 409 U.S. 249 (1972), which concerns the application of federal admiralty tort jurisdiction to an airplane crash into navigable waters, was not relevant to determination of LHWCA coverage).

The section of the OCSLA the Court considered in *Rodrigue* and *Huson*, 43 U.S.C. (1970 ed.) 1333(a)

---

[17] The OCSLA does include a section, 43 U.S.C. (Supp. V) 1333(b), providing that workers injured as a result of petroleum operations on the Outer Continental Shelf will receive LHWCA benefits. See page 4, note 5, *supra*. However, that provision was not at issue in *Rodrigue* and *Chevron*, which involved tort actions by workers against parties other than their employers.

(2), provided that the laws of the adjacent states would apply to artificial islands and fixed structures on the Outer Continental Shelf to the extent they were not inconsistent with federal laws and regulations. In *Rodrigue*, the Court determined that under Section 1333(a)(2) Louisiana law, rather than the federal Death on the High Seas Act, governed a wrongful death action arising out of an injury on an artificial island oil drilling platform located on the Outer Continental Shelf. In *Chevron*, the Court similarly determined that the Louisiana statute of limitations, rather than the admiralty doctrine of laches, governed a tort action based on an injury on an artificial island drilling rig on the Outer Continental Shelf. The Court based these holdings in part on its conclusion that, for admiralty law purposes, such drilling platforms should not be treated as vessels or navigational aids. *Rodrigue*, 395 U.S. at 359-361; *Huson*, 404 U.S. at 100-105. Because admiralty law did not apply to injuries on land or "extensions of land" (such as piers or ramps running into the sea), the Court concluded that state law would govern by virtue of Section 1333(a)(2).[18]

The Court also concluded in *Rodrigue* that even if admiralty law would have applied to artificial island drilling rigs under traditional principles, it was clear from the legislative history of the OCSLA that Congress did not intend that result. There was affirmative evidence that Congress intended such structures to be treated as islands, or as federal enclaves within a landlocked state. The Court pointed out that al-

[18] The Court in *Rodrigue* also noted that the Death on the High Seas Act would provide far less comprehensive remedies to artificial island workers than would state law as adopted by the OCSLA. 395 U.S. at 361.

though Congress was aware that it could have extended the admiralty jurisdiction to these artificial islands, it concluded that application of maritime law would be inappropriate, particularly in view of the special relationship between workers on the artificial islands and the adjacent shore to which they commuted. *Rodrigue*, 395 U.S. at 361-366.

Rodrigue does not stand for the proposition that offshore oil work on fixed platforms is nonmaritime; rather, it is based on the premise that injuries on fixed platforms—like injuries on piers or jetties (395 U.S. at 360)—are not within the *admiralty* jurisdiction because they do not take place on navigable waters. See Robertson, *supra*, 55 Tex. L. Rev. at 1010-1011 n.247. Unlike admiralty law, the LHWCA no longer requires that an injury occur on navigable waters; as we described above, Congress has extended LHWCA coverage landward in order to avoid the anomalies in coverage that resulted from the pre-1972 constraint. Moreover, unlike the legislative history of Section 1333(a)(2) of the OCSLA, the legislative history of the 1972 LHWCA amendments does not reflect any special concern that state statutes should govern offshore platform workers; indeed, as we explained above, Congress's preference was for expanded federal coverage in the area of workers' compensation, because it perceived state benefits to be inadequate.[19]

[19] Amici Texaco, et al., likewise err in relying (Br. 14-15) on *Sohyde Drilling & Marine Co.* v. *Coastal States Gas Producing Co.*, 644 F.2d 1132 (5th Cir.), cert. denied, 454 U.S. 1081 (1981), an admiralty tort case that arose under the Admiralty Extension Act, 46 U.S.C. 740. The Fifth Circuit itself has rejected the application of *Sohyde Drilling* to LHWCA cases because it concerns the question "whether the wrong asserted—the injury complained of—bore a significant relationship to maritime activity." *Pippen* v. *Shell Oil Co.*,

If anything, *Rodrigue* and *Chevron* help Gray, rather than petitioners. The Court suggested in those cases that fixed offshore platforms are analogous to extensions of land such as piers and wharves.[20] The latter clearly are instrumentalities of maritime commerce covered by Section 2(3) of the LHWCA, even though they may not be subject to admiralty jurisdiction. Likewise, offshore drilling operations that take place on extensions of land in the form of fixed platforms are properly characterized as maritime in nature for purposes of the LHWCA, even if they are not subject to admiralty law.[21]

---

661 F.2d at 384 n.10. That question is different from the LHWCA inquiry whether an individual's employment bore a significant relationship to maritime activity. See *id.* at 384 nn.9, 10. In distinguishing *Sohyde Drilling*, the Fifth Circuit has noted the difference in the legislative purposes underlying the Admiralty Extension Act and the LHWCA. See *Boudreaux* v. *American Workover, Inc.*, 680 F.2d at 1050 n.31.

[20] In discussing the application of admiralty law to artificial island drilling rigs, the Court in *Rodrigue* noted that "[a]dmiralty jurisdiction has not been construed to extend to accidents on piers, jetties, bridges, or even ramps or railways running into the sea" (395 U.S. at 360); that the accidents on the rigs "had no more connection with the ordinary stuff of admiralty than do accidents on piers" (*ibid.*); and that "the legislative history [of the OCSLA] shows that accidents on [artificial island drilling rigs], which under maritime principles would be no more under maritime jurisdiction than accidents on a wharf located above navigable waters, were not changed in character by the [OCSLA]" (395 U.S. at 366).

[21] There is no question that Congress intended to reach beyond the traditional scope of admiralty jurisdiction when it used the term "maritime" in the 1972 LHWCA amendments. For example, Congress expressly included activities such as shipbuilding within the definition of maritime employment, despite the fact that shipbuilding was not traditionally regarded as "maritime" for purposes of admiralty contract jurisdiction. See, *e.g.*, *People's Ferry Co.* v. *Beers*, 61 U.S. (20 How.) 393 (1857).

4. Petitioners also contend (Br. 14-15) that Gray cannot be within the intended coverage of the LHWCA because Congress explicitly rejected the inclusion of offshore oil workers under the Act when it considered the "Tower bill." See S.1547, 92d Cong., 1st Sess. (1971) (Marine Petroleum Workers' Compensation Act of 1971), *reprinted in Hearings, supra*, at 24-27. The Fifth Circuit, sitting en banc in *Boudreaux* v. *American Workover, Inc.*, 680 F.2d at 1053, correctly rejected that contention. As the *Boudreaux* court explained, the Tower bill would have extended LHWCA coverage to *all* marine petroleum extraction workers, with the result that crew members on movable rigs and other vessels would have lost the right to the more generous damages available under the Jones Act, 46 U.S.C. 688. See 117 Cong. Rec. 10490-10491 (1971) (introductory statement of Sen. Tower); *Hearings, supra*, at 257-258 (remarks of Sen. Tower); *id.* at 395-397, 402, 411, 413-414, 421 (remarks of Joseph Shelton, representing the International Association of Drilling Contractors); *id.* at 530-532 (remarks of E. Leland Richardson). Representatives of maritime workers who qualified as seamen voiced strong opposition to the proposed elimination of the Jones Act remedy. See *id.* at 574-590 (remarks and statement of William Moody, representing the Maritime Trades Department, AFL-CIO); *id.* at 591-613 (remarks and statement of John R. Martzell).

At the time the Tower bill was proposed, it was undisputed that noncrew offshore oil workers injured on any type of platform on the Outer Continental Shelf were covered by the LHWCA by virtue of the

OCSLA, 43 U.S.C. (Supp. V) 1333(b). See page 4 note 5, *supra*. In addition, it was clear that noncrew workers who were injured on movable rigs in territorial waters were covered by the LHWCA, since such rigs are considered vessels (see page 29 note 23, *infra*). *Boudreaux* v. *American Workover, Inc.*, 680 F.2d at 1053; *Hearings*, *supra*, at 395-397 (remarks of Joseph Shelton); *id.* at 487 (excerpt from The Jones Act Committee Report on Investigative Phase); *id.* at 511-514, 531-532 (remarks of E. Leland Richardson); *id.* at 592-594 (remarks of John R. Martzell). It seems most likely that Congress rejected the Tower bill because it believed that existing legislation, combined with the 1972 amendments, would afford LHWCA coverage to all noncrew offshore oil workers, and because it did not wish to deprive crew members of their more lucrative Jones Act recovery. See *Boudreaux*, 680 F.2d at 1053.[22]

---

[22] *Victory Carriers, Inc.* v. *Law*, 404 U.S. 202 (1971), relied on by petitioners (Br. 17), is inapposite. *Victory Carriers* involved not the LHWCA but rather the attempted invocation of admiralty jurisdiction in a longshoreman's suit against a shipowner based on injuries sustained on a wharf. The case arose before Congres extended LHWCA coverage to such locales, and it was alleged that the state workers' compensation remedy available to the longshoreman provided inadequate benefits. The Court nevertheless declined to extend admiralty jurisdiction in the absence of congressional authorization. The Court did note that "if denying federal remedies to longshoremen injured on land is intolerable, Congress has ample power under Arts. I and III of the Constitution to enact a suitable solution." 404 U.S. at 216 (footnote omitted). Of course, that is precisely what Congress did in expanding LHWCA coverage in 1972.

C. Respondent Gray Was Injured on a Covered Situs Within the Meaning of Section 3(a) of the LHWCA

The court of appeals correctly concluded that the location of Gray's injury—a fixed marine petroleum production platform—falls within the expanded shoreside coverage of the amended LHWCA. Before 1972, when coverage of the Act extended only to injuries "occurring upon * * * navigable waters," 44 Stat. 1426, fixed platform injuries that occurred within state territorial boundaries were not compensable, because, unlike floating barges and other types of mobile drilling rigs, fixed platforms are not vessels. See Robertson, *supra*, 55 Tex. L. Rev. at 992-994.[23] However, the 1972 amendments to the Act expanded the definition of "navigable waters" to include, inter alia, piers, wharves, and terminals, as well as "other adjoining area[s] customarily used by an employer in loading [or] unloading * * * a vessel." 33 U.S.C. 903(a).

The statutory reference to "other" adjoining areas is broad enough to include fixed platforms.[24] Such

---

[23] Because of their mobility, floating rigs are treated as vessels. See, *e.g.*, *Producers Drilling Co.* v. *Gray*, 361 F.2d 432, 436-437 (5th Cir. 1966); *Hendon* v. *Marathon-LeTourneau*, 414 F. Supp. 1282 (S.D. Miss. 1976). Injuries on the rigs are therefore "injuries occurring upon the navigable waters," compensable under both the original LHWCA and the 1972 amendments. See, *e.g.*, *Perini North River Associates*, *supra*; *Boudreaux* v. *American Workover, Inc.*, 680 F.2d at 1052, 1053; Robertson, *supra*, 55 Tex. L. Rev. at 986-987. Stationary rigs are not regarded as vessels. *Rodrigue* v. *Aetna Casualty & Surety Co.*, 395 U.S. at 359-361; *Bertrand* v. *Shell Oil Co.*, 489 F.2d 293, 295 (5th Cir. 1973).

[24] In several decisions a Department of Labor administrative law judge has concluded that a fixed offshore platform is

platforms are, of course, completely surrounded by water. Like piers, fixed platforms generally are elevated above water, with supports that reach down to the seabed. See *Hearings*, *supra*, at 480, 484. Since fixed platforms are of limited size,[25] an individual standing on such a platform presumably is always aware that he is working close to (and in many cases directly above, see illustrations at *Hearings*, *supra*, at 480, 484) navigable waters. As the court of appeals observed (Pet. App. A4), petroleum production platforms serve the functions of wharves in that they are "essential to and customarily used in the loading and unloading of crews, supplies and oil." Indeed, as we noted above (page 26 note 20, *supra*), this Court in *Rodrigue* suggested that artificial island drilling rigs were similar in some respects to structures such as piers and wharves. The similarity is not surprising in view of the fact that production of oil from coastal waters apparently began from piers in the Santa Barbara Channel. *Hearings*, *supra*, at 831.

Amici Texaco, et al., contend (Br. 7) that nothing in the record indicates that any part of the platform on which Gray was injured was used to load or unload vessels. The court of appeals' contrary conclusion is supported by the testimony that Gray himself and his equipment were transported between platforms "[u]sually by boat" (Jan. 20, 1978 Tr. 32; see also

---

a covered situs. *Neal* v. *Wilson Wireline Services*, 2 Ben. Rev. Bd. Serv. (MB) (ALJ) 88 (1975); *Henning* v. *Vacco Wireline Service*, 2 Ben. Rev. Bd. Serv. (MB) (ALJ) 87 (1975); *Wiley* v. *Wilson Wireline Services*, 2 Ben. Rev. Bd. Serv. (MB) (ALJ) 86 (1975).

[25] The area of the upper deck of a fixed drilling platform often is in the range of 200 feet square. See *Hearings*, *supra*, at 834; see also *id.* at 836 (referring to a platform with a 150-foot square deck).

Pet. App. A2). In any event, there is no reasonable basis on which to dispute the court of appeals' conclusion. See Kerr-McGee Am. Br. 3.

Amici Texaco, et al., also contend (Br. 7) that a claimant must show that his injury occurred in the particular part of a covered adjoining area that was customarily used for loading and unloading vessels. The record does not indicate Gray's exact location on the platform at the time of his injury. But this Court's decision in *Northeast Marine Terminal Co.* v. *Caputo* makes clear that when a facility adjoins the water and at least a portion of the facility is used for loading and unloading vessels, the entire facility is a covered situs. In *Caputo* the Court rejected the employer's claim that a pier used only for stripping and stuffing containers, rather than for direct loading and unloading of vessels, was not a covered situs. In the Court's view, the pier was part of an "entire terminal facility," some of which was indisputably used for loading and unloading vessels. 432 U.S. at 279-281. Thus, the Court rejected the very argument amici make here. See also *Prolerized New England Co.* v. *Benefits Review Board*, 637 F.2d at 38-39 ("expansive construction of 'adjoining area' is necessary * * * to avoid resurrecting the evil of shifting coverage that Congress sought to avoid in the 1972 amendments"); *Texports Stevedore Co.* v. *Winchester*, 632 F.2d 504, 514-516 (5th Cir. 1980) (en banc), cert. denied, 452 U.S. 905 (1981) (entire "area" adjoining water is covered situs).[26]

---

[26] We do not suggest, *e.g.*, that the entirety of any island would qualify as a covered situs merely because its shores were used for loading or unloading. The artificial "islands" and fixed platforms used in the maritime petroleum industry are of limited size (see note 25, *supra*) and resemble piers

D. Petitioners' Contention That Gray Is Not Covered Under the LHWCA Is Inconsistent With the Principles That the Act Must Be Read Liberally and Should Be Construed to Promote Congress's Objective of a Uniform Compensation System for Maritime Workers

Petitioners contend (Br. 13-15) that Congress could not have meant to bring offshore oil workers like Gray within the coverage of the LHWCA, since it did not specifically refer to such workers when it enacted the 1972 amendments. That contention is inconsistent with this Court's repeated recognition that the Act must be given an expansive construction to fulfill its remedial purposes. And, more important, petitioners' claim disregards Congress's intent to create a uniform compensation system for maritime workers. Under petitioners' interpretation of the Act, workers like Gray would walk in and out of LHWCA coverage during the course of their employment, as they moved from boat to fixed rig to movable rig, and as they switched from assignments in territorial waters to assignments on the Outer Continental Shelf. That

---

and wharves far more than they resemble natural islands. See, *e.g.*, *Hearings*, *supra*, at 480, 484, 485, 830, 833.

It is of no consequence that the platform on which Gray was injured may not have been "used for loading and unloading by Gray's employer, Herb's Welding, but by the platform's owner (Chevron)" (Kerr-McGee Am. Br. 3 n.3). The platform is a covered situs if it is customarily used for significant maritime activity by any statutory employer. See *Texports Stevedore Co.* v. *Winchester*, 632 F.2d at 515; *Odom Construction Co.* v. *Dep't of Labor*, 622 F.2d at 114-115. Cf. *Novelties Distribution Corp.* v. *Molee*, 710 F.2d 992, 994-997 (3d Cir. 1983), cert. denied, No. 83-538 (Jan. 23, 1984); *Hullinghorst Industries, Inc.* v. *Carroll*, 650 F.2d at 757. There is no suggestion that Chevron was not an employer within the meaning of the LHWCA. See 33 U.S.C. 902(4).

construction is clearly at odds with congressional intent.

1. To the extent there is uncertainty about the scope of the LHWCA, it should be resolved in favor of coverage. This Court has held that the Act must be " 'liberally construed in conformance with its purpose, and in a way which avoids harsh and incongruous results.' " *Northeast Marine Terminal Co.* v. *Caputo*, 432 U.S. at 268 (quoting *Voris* v. *Eikel*, 346 U.S. 328, 333 (1953)). See also *Perini North River Associates*, slip op. 18. Courts applying this principle have held that the "broadest ground [the Act] permits of should be taken." *De Bardeleben Coal Corp.* v. *Henderson*, 142 F.2d 481, 484 (5th Cir. 1944), quoted with approval in *Calbeck* v. *Travelers Insurance Co.*, 370 U.S. at 130. This Court has specifically characterized the 1972 amendments as "remedial" legislation that reflects solicitude for maritime workers and a "broad[] congressional purpose of expanding coverage." *Sun Ship, Inc.* v. *Pennsylvania*, 447 U.S. 715, 725-726 (1980); *P.C. Pfeiffer Co.* v. *Ford*, 444 U.S. at 83; *Northeast Marine Terminal Co.* v. *Caputo*, 432 U.S. at 268. In view of the remedial nature of the 1972 amendments, it would be inappropriate to read them as foreclosing LHWCA coverage for offshore oil workers in Gray's position simply because Congress did not state expressly that such workers are to be covered.

2. Exclusion of workers like Gray from LHWCA coverage would be clearly inconsistent with Congress's express purpose of creating a uniform compensation system for maritime workers through enactment of the 1972 amendments. As we explained above (at 13), Congress was particularly concerned with removing situations in which employees would walk in and out of LHWCA coverage in the course of their working day, as they had under the original Act.

This Court has recognized on several occasions that the provisions for LHWCA coverage should be construed expansively in order to achieve Congress's goal of uniform coverage for employees who regularly move between land and water. *P.C. Pfeiffer Co.* v. *Ford*, 444 U.S. at 83-84; *Northeast Marine Terminal Co.* v. *Caputo*, 432 U.S. at 268.

In *Caputo* the Court held that a checker and a terminal laborer were "engaged in maritime employment" for purposes of the status requirement of the amended LHWCA, even though they were not directly involved in unloading a vessel. The Court expressly rejected a "point of rest" theory, under which maritime employment would include only that portion of the unloading process that takes place before the longshoring gang places cargo on the pier, in large part because it viewed that theory as inconsistent with the congressional intent to provide expanded, uniform coverage. 432 U.S. at 274-277. The Court likewise concluded that the situs test for coverage had been met, despite the fact that the checker was injured in a part of the terminal that was not used for the immediate loading and unloading of vessels. See *id.* at 279-281; page 31, *supra*. In *Ford* the Court rejected a definition of "maritime employment" that would have required that on the day of his injury on land the employee could have been assigned to work on navigable waters. Since both claimants in that case were engaged in duties longshoremen normally perform in the course of transferring goods between ship and land transportation, the Court concluded that they were an integral part of the loading and unloading process and were therefore engaged in maritime employment, even though neither claimant moved cargo directly to or from a vessel. 444 U.S.

at 81-84. The Court noted that this result served the congressional purposes of expanding coverage to onshore maritime duties, applying a simple uniform standard, and reducing the number of employees walking in and out of coverage. *Id.* at 83-84 & n.18.

In view of Congress's goal of a uniform compensation system and its concern with avoiding situations in which employees would walk in and out of coverage in the course of their employment, Congress could not have intended to exclude LHWCA coverage for injuries of those marine petroleum workers who happen to be working on fixed platforms in territorial waters. Offshore oil workers who are injured in other locations are entitled to receive LHWCA benefits.[27] In 1953, Congress extended LHWCA coverage to injuries resulting from petroleum production-related activities on the Outer Continental Shelf, through enactment of the OCSLA, 43 U.S.C. (Supp. V) 1333(b). See page 4 note 5, *supra*. Accordingly, LHWCA compensation is available for injuries sustained on either floating rigs (*Guidry* v. *Continental Oil Co.*, 640 F.2d 523, 530 & n.21 (5th Cir.), cert. denied, 454 U.S. 818 (1981)) or fixed rigs (*Smith* v. *Chevron Oil Co.*, 517 F.2d 1154, 1156 (5th Cir. 1975)) on the Shelf. LHWCA coverage also exists for workers injured on movable rigs in territorial waters, because such rigs are treated as vessels. See page 29 note 23, *supra*. A conclusion that Congress meant to exclude from LHWCA coverage the remain-

---

[27] We do not refer here to offshore oil workers who are part of the crew of a vessel. LHWCA coverage does not extend to any offshore oil worker who qualifies as a master or member of a crew of a vessel. See 33 U.S.C. 902(3); 43 U.S.C. (Supp. V) 1333(b)(1). Masters and crew members retain the traditional remedies available to seamen, including recovery under the Jones Act.

ing category of injuries to marine petroleum employees—those that occur on fixed rigs in territorial waters—would reintroduce the "checkered" coverage that the 1972 amendments to the Act were designed to eliminate. See generally *Northeast Marine Terminal Co.* v. *Caputo*, *supra*.[28]

Moreover, such a distinction would make little sense. Even a glance at the illustrations of different types of rigs, included in the 1972 Senate hearings, shows how similar movable rigs and fixed platforms may be. For example, both jack-up barges (see *Hearings*, *supra*, at 482) and fixed platforms (see *id.* at 484) are supported by structures that reach down into the seabed, although the former are regarded as vessels and the latter are not. As we noted above (at 19), all offshore petroleum workers—whether on fixed or movable rigs, whether in territorial waters or on the Outer Continental Shelf—face special maritime hazards. Denial of benefits only in the case of those offshore oil workers who incur injuries on fixed platforms in territorial waters would clearly frustrate the congressional goals of expansive coverage and uniformity. See generally *P.C. Pfeiffer Co.* v. *Ford*, 444 U.S. at 83-84. As the court below recognized, it would not be defensible to "create [such] a curious hole in LHWCA coverage" (Pet. App. A5; footnote omitted).

Denial of LHWCA benefits to an individual like Gray would be particularly anomalous. Gray is an amphibious worker—one who walked in and out of

---

[28] Senator Eagleton, who chaired the hearings on the 1972 amendments to the LHWCA, expressed the view that it should not make a difference, for coverage purposes, whether fixed platforms were located in territorial waters or on the Outer Continental Shelf. *Hearings*, *supra*, at 594.

coverage under the old Act. He was subject to assignment to jobs on a number of different platforms throughout the Bay Marchand oil field. Gray was clearly covered under the LHWCA in connection with injuries he might incur while traveling to and from the drilling rigs on which he worked. He was also covered with respect to any injury he might incur while working on rigs located on the Outer Continental Shelf (on which he spent 25% of his working time). To the extent Gray may have worked on movable rigs in territorial waters, he would have received LHWCA benefits for any injuries he experienced on such rigs. See pages 27-28, *supra*.[29] Gray would even have been covered in connection with an injury he suffered while he worked on a fixed platform in territorial waters if, *e.g.*, he had been standing on a boat while welding the side of the platform. Congress could hardly have wanted a worker's right to receive LHWCA benefits to depend on the "fortuitous circumstance" (S. Rep. 92-1125, *supra*, at 13) of whether his injury occurred while he was standing on a platform or directly beside it.

Congress intended that maritime employees like Gray, who previously had been covered during part of their employment, would receive uniform LHWCA coverage under the 1972 amendments. See *Perini North River Associates*, slip op. 21 n.27; *P.C. Pfeiffer Co.* v. *Ford*, 444 U.S. at 83; *Northeast Marine Terminal Co.* v. *Caputo*, 432 U.S. at 273-274. Therefore,

---

[29] Many offshore employees presumably divide their time between fixed platforms and movable structures. See, *e.g.*, *Pippen* v. *Shell Oil Co.*, 661 F.2d at 383 n.6, noting Pippen's testimony that approximately 75% of his offshore work as a wireline operator was on inland barges and floaters, as opposed to fixed platforms.

it is most unlikely that Congress intended to deny LHWCA coverage to Gray and others like him during the time they were working on fixed rigs located in territorial waters.[30]

---

[30] As we argued in our Brief in Opposition (at 10-11), we believe that Gray was entitled to LHWCA benefits for the additional reason that he was injured "as the result of operations conducted on the outer Continental Shelf for the purpose of exploring for, developing, removing, or transporting by pipeline the natural resources * * * of the subsoil and seabed of the outer Continental Shelf," and thus came within the terms of the OCSLA, 43 U.S.C. (Supp. V) 1333(b). The Benefits Review Board adopted this reasoning, but the court of appeals did not address the issue directly. Cf. Pet. App. A10-A13. If the Court should reject our argument that Gray was covered under the terms of the LHWCA itself, we believe that the proper course would be for the Court to remand to the court of appeals for consideration of the alternative argument for coverage based on the OCSLA.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

REX E. LEE
Solicitor General

KENNETH S. GELLER
Deputy Solicitor General

CAROLYN F. CORWIN
Assistant to the Solicitor General

FRANCIS X. LILLY
Solicitor of Labor

KAREN I. WARD
Associate Solicitor

ALLEN H. FELDMAN
Counsel for Appellate Litigation

JOSHUA T. GILLELAN II
STEVEN J. MANDEL
Attorneys
Department of Labor

JULY 1984

☆ U. S. GOVERNMENT PRINTING OFFICE: 1984 421923 589